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No.

IN THE

Supreme Court of the United States

DATALECT COMPUTER SERVICES, LTD.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff who has proved that it incurred monetary injury as a result of the defendant's wrongful conduct can nonetheless be denied any recovery on the ground that it did not prove the amount of damages with specificity.

PARTIES TO THE PROCEEDING

All the parties to the proceeding are named in the caption. The parent of Datalect Computer Services, Ltd., is Citylink Group, Ltd., a corporation organized under the laws of the United Kingdom. Datalect Computer Services, Ltd., has no subsidiaries except wholly-owned subsidiaries. No affiliate of Datalect Services, Ltd., has issued shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

Datalect Computer Services, Ltd., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a-15a) is unreported. The opinion of the trial court on damages (Pet. App. B, 16a-35a) is reported at 41 Fed. Cl. 720. The opinion of the trial court on liability (Pet. App. C, 36a-65a) is reported at 40 Fed. Cl. 28.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1999. Pet. App. 1a. A petition for rehearing was filed on August 26, 1999, and denied on September 21, 1999 (*id.* at 66a-67a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The issue presented by this case is both straightforward and fundamental. Petitioner demonstrated that the government wrongfully provided misleading information before it entered a contract with petitioner. The government did not challenge that finding on appeal. Petitioner also demonstrated, as the trial judge explicitly found, that petitioner "incurred monetary injury as a result of" the government's conduct. Pet. App. 34a. That finding, too, was undisturbed on appeal. Petitioner then provided more than ample evidence bearing on the measure of the damages it had incurred—including a bid it had prepared on a contract that closely resembled the one the government would have proposed if the government had not acted wrongly.

Nonetheless, the court below denied any recovery to petitioner. Faced with uncertainty about the precise measure of damages—uncertainty that was the result of the government's wrongful conduct—the court chose a quantum of damages—zero—that it knew to a certainty was *not* correct. This result, which unfortunately appears to be consistent with a recent trend in the Court of Appeals for the Federal Circuit, not only flies in the face of "[t]he most elementary conceptions of justice and public policy" (*Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946)), but is flatly inconsistent with this Court's decisions and the decisions of other courts of appeals.

1. Petitioner Datalect Computer Services, Ltd., is a corporation organized under the laws of the United Kingdom. In 1992, Datalect bid on, and was awarded, a requirements contract to provide computer maintenance services for the United States Army in Germany. Pet. App. 2a. The contract had a term of one year with three one-year extension options, each of which the Army exercised. *Id.* The contract provided in part that "the Gov-

ernment shall order from the Contractor all the supplies and services specified in the Schedule that are required to be purchased by the Government * * *." *Id.* Datalect's bid specified a price per call for each category of service call. *Id.* at 3a-4a.

Regulations require that the government provide estimates of its expected requirements when it enters into a requirements contract. See Pet. App. 2a, citing 48 C.F.R. 16.503(a)(1). In this case, the government's estimates were based on its past service requirements. Pet. App. 2a-3a. Then, in the first year of the contract, the Army's maintenance calls to Datalect were only about half of the number specified by the estimates. *Id.* at 4a. Specifically, "[d]espite the historical workload of 60-65 service calls per business day, the actual service call rate under the Datalect contract fluctuated between approximately 25-45 service calls per day." *Id.* at 40a. In the next two years, the number of calls again fell far short of the estimates. *Id.* at 4a. Because Datalect charged by the call, "it received much less revenue than it would have if the estimated number of calls had been made." *Ibid.*

Datalect complained to the Army about the low call volume and learned, among other things, that the Army had trained its Information Management Officers to do some of the easier maintenance work, thus reducing the number of calls referred to Datalect. Pet. App. 4a, 41a-43a, 51a. In addition, the Army had purchased new computers with one- to five-year warranties, and some of the work that would otherwise have been referred to Datalect was done by the vendors of the machines under warranty. *Id.* at 43a-44a, 51a. The Army had also reduced its troop levels in Germany during the period, and that, too, reduced the number of service calls to Datalect. *Id.* at 51a.

2. Datalect submitted a claim to the Army contracting officer for the revenue it would have received if the call estimates had been accurate. Pet. App. 4a. When the contracting officer denied the claim, Datalect brought suit in the United States Court of Federal Claims. Datalect invoked the jurisdiction of that court under 28 U.S.C. 1491(a)(1). Datalect alleged that the government breached the contract in three ways: by performing maintenance in-house; by ordering maintenance work under extended warranties; and by failing to take reasonable care in preparing the estimates of the amount of work that Datalect could expect to receive under the requirements contract. Pet. App. 4a-5a.

The Court of Federal Claims granted summary judgment in favor of the government on the first two claims, concerning in-house work and warranties. But the trial court granted summary judgment in favor of Datalect, on the issue of liability, on the claim that the government had not exercised reasonable care in the preparation of the estimates. Pet. App. 36a-65a. The trial court explained (*id.* at 50a; citations omitted):

> An offeror on a government contract is entitled to rely on the government estimate set forth in the contract as representing an honest and informed conclusion. * * * The government is bound by a good faith standard which requires it to seek the most current information available, and either reformulate its estimate when warranted by the information available, or notify offerors of situations or factors likely to affect the estimate.

The trial court noted that the government did not dispute that it "was aware of several factors that would likely affect [its] requirements during the term of Datalect's contract, including the troop drawdown, the encouragement of and resulting self-maintenance of [certain]

equipment, and the influx of new computers with extended warranties." Pet. App. 51a. The trial court found that "[i]f the estimate of the government's requirements had been reasonably accurate and had accounted for the several situations likely to affect the magnitude of the government's requirements, the government's performance of in-house maintenance and repair * * * and its use of the new warranties would not have so severely damaged Datalect." *Id.* at 64a. The trial court concluded (*id.* at 52a):

> As a result of the government's failure to take into account such factors in formulating its estimate, the court holds that defendant negligently prepared its estimate and that plaintiff is therefore entitled to recover.

3. The court then held a trial to determine the amount of damages. See Pet. App. 16a-35a. At that trial, Datalect presented two alternative approaches to the calculation of damages. The first approach was based on the difference between what Datalect actually bid and what it would have bid if the government had acted lawfully—that is, if the government either had provided properly prepared estimates or had disclosed the information in its possession that rendered its estimates inaccurate. The second approach was to determine the increased cost incurred by Datalect on the calls it did receive; the increased cost was the result of, for example, Datalect's having to allocate its fixed costs to a smaller number of calls than it had anticipated. See *id.* at 5a.

Datalect presented evidence on these issues by a variety of means. For example, Datalect introduced testimony about how the prices stated in its bid were initially calculated. See Pet. App. 24a-26a; C.A. App. A0895-96,

A1001-03.[1] Datalect also introduced into evidence a cash flow statement, which it had submitted to the Army at an earlier stage of bid negotiations, that showed how overhead costs were allocated among the categories of service calls. C.A. App. A0853; see Pet. App. 26a-27a. Datalect's chairman and director, William Fattal, testified about, among other things, the cost reductions that could have been implemented if Datalect had known that it would receive a much smaller volume of calls than the Army had estimated. C.A. App. A0856-58.

Datalect also drew attention to an episode that occurred before its bid was accepted. Initially, the Army's solicitation contained a "minimum order clause" that provided that the Army would not purchase from the contractor supplies or services with a value less than $250.00. See Pet. App. 3a. Datalect initially prepared a bid on the basis of this minimum order clause. After negotiations, however, Datalect and the Army agreed to amend the minimum order clause to reduce the minimum amount to $1; this amendment had the effect of requiring the Army to purchase all services and supplies covered by the contract from Datalect. After the amendment, Datalect reduced its bid and won the contract. *Id.* at 3a-4a; see C.A. App. A0852-53.

At the trial on damages, Datalect pointed to these events as evidence that it would have insisted on higher prices if it had known it was going to receive less work. Datalect also argued that the earlier bid provided a rough measure of what Datalect would have bid if it had known that the Army planned to perform maintenance work in-house and would therefore provide many fewer calls than its estimates specified. The trial court summarized the

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1 "C.A. App." refers to the appendix filed in the Federal Circuit.

evidence and arguments on this point as follows (Pet. App. 24a):

> Mr. Fattal testified that Datalect materially altered its bid in response to th[e] amendment. Datalect believed that this amendment virtually guaranteed that the government would do none of its own repairs and that Datalect would be called for even the simplest repairs. As a result, Datalect dramatically reduced its prices. The reasoning behind this price revision, according to Mr. Fattal, was that after the amendment, Datalect could reasonably expect to get all of the estimated calls * * * not merely those in an amount less than $250.00. The additional calls would be "easy," less costly calls and the added volume would enable one engineer to service several calls in one site visit. Moreover, plaintiff's overhead costs would be defrayed among more calls, lowering the overhead charged against each call. Datalect's costs per call would be lower and the anticipated savings were reflected in the revised prices.

4. The trial court nonetheless held that Datalect was entitled to no damages. The trial court reaffirmed its earlier findings that the government had acted wrongfully and that Datalect had been damaged by the government's wrongful actions. See Pet. App. 19a, 34a. Indeed, the trial court explicitly stated: "[T]he court is persuaded that plaintiff incurred monetary injury as a result of defendant's faulty estimate" (*id.* at 34a). But the trial court refused to award any damages to Datalect, stating: "[T]he court finds that plaintiff has failed to meet its burden of proving the amount of damages." *Id.* at 17a.

On appeal, the government did not challenge the trial court's holding that the government had wrongfully provided misleading estimates to Datalect. See Pet. App. 12a. Nonetheless, the court of appeals affirmed the trial

court's ruling that Datalect could not recover damages.[2] See *id.* at 2a, 12a-15a. The court of appeals asserted that "Datalect's task at trial was to show by how much it would have benefitted if the Army had taken the available information into account in formulating the contract estimates" (*id.* at 12a). The court concluded that Datalect had not carried this burden. See *id.* at 12a-15a.

The court of appeals faulted Datalect's first approach to the damages issue—based on the difference between what Datalect actually bid and what it would have bid if the Army had made proper disclosures or estimates—on two grounds. First, the court said, "Datalect * * * never produced any evidence as to what estimates the Army would have made if it had not acted negligently." Pet. App. 13a. Consequently, the court stated, "Datalect's evidence that sought to establish the bid it would have made fails to provide the basis for a damages award." *Ibid.* In addition, the court of appeals asserted, Datalect's hypothetical prices "were based in part on the assumption that the Army would have disclosed to Datalect the mix of 'easy' and 'hard' calls that made up the estimates." *Ibid.* Since the Army's failure to disclose this information was not among the reasons that the trial court had found the government liable, "the evidence of Datalect's proposed pricing differential * * * was not responsive to the breach to which the calculation of damages was supposed to be addressed." *Id.* at 14a.

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[2] The court of appeals also affirmed the trial court's grant of summary judgment in favor of the government on the in-house maintenance claim (see Pet. App. 6a-9a), but reversed the grant of summary judgment against Datalect on the claim that the Army breached the contract by having maintenance work done under extended warranties. The court of appeals held that the language of the contract did not clearly resolve that question and that Datalect had raised material issues of fact. See *id.* at 9a-12a.

The court of appeals also rejected Datalect's alternative measure of damages, which was based on the increased cost incurred by Datalect on the calls it did receive. The court stated that Datalect could not use this method because "Datalect did not present evidence showing that the *entire* decrease in call volume would have been reflected in a nonnegligent estimate." Pet. App. 14a (emphasis added).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is in error, and it is inconsistent both with a clear line of precedent in this Court and with the decisions of other courts of appeals. Moreover, this decision cannot be treated as an isolated incident; it appears to reflect a trend in the Federal Circuit toward requiring plaintiffs who have proved wrongful conduct and causation in suits against the government to prove their damages with specificity as well. Further review is therefore warranted.

1. a. A plaintiff, of course, ordinarily bears the burden of proving that the defendant acted wrongly and caused its injuries. A plaintiff who has made that showing, however, does not have the burden of proving the precise amount of damages. The plaintiff need only furnish enough evidence to allow the court to make a nonarbitrary assessment of damages. The Court had held this repeatedly, in cases arising under a variety of federal statutes. See, *e.g.*, *Eastman Kodak Co. v. Southern Photo Materials*, 273 U.S. 359, 376-79 (1927); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-66 (1931); *Palmer v. Connecticut Railway & Lighting Co.*, 311 U.S. 544, 558-61 (1941); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 262-67 (1946); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946); *J. Truett Payne Co., Inc. v. Chrysler Motors*

Corp., 451 U.S. 557, 563-68 (1981). See also *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 405-06 (1940); *Hetzel v. Baltimore & Ohio R. Co.*, 169 U.S. 26, 37, 38-39 (1898).

The reason for this principle, which "is an ancient one" (*Bigelow*, 327 U.S. at 265), is apparent: "[T]he risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party." *Story Parchment Co.*, 282 U.S. at 563. Indeed, "[a]ny other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim." *Bigelow*, 327 U.S. at 264. As this Court has said, in words that apply directly to this case: "Where the [wrong] itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." *Story Parchment Co.*, 282 U.S. at 563.

In applying this principle, the Court has consistently refused to place on plaintiffs the burden of dispelling uncertainty about the measure of damages, and has accepted evidence of damages that falls well short of precision. This is especially true in a case of this kind, where the measure of damages necessarily depends on a hypothetical reconstruction of how the marketplace would have operated, had it not been affected by the government's negligent conduct. As the Court has explained (*J. Truett Payne Co.*, 451 U.S. at 566):

> Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land. The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's * * * violation.

As a result, the Court has said in an antitrust case, for example, that an award of damages may be based on "evidence of the decline in prices, profits and values, not shown to be attributable to other causes" (*Bigelow*, 327 U.S. at 264). Similarly, when a copyright has been infringed, the infringer—not the victim—has the responsibility of separating the portion of the profits attributable to the infringer's own efforts. See *id.* at 265, citing *Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co.*, 225 U.S. 604 (1912), and *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251 (1916). "Where there is a commingling of gains, [the infringer] must abide the consequences, unless he can make a separation of the profits so as to assure to the injured party all that justly belongs to him." *Sheldon*, 309 U.S. at 406. See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977).

b. Datalect established, at the liability phase of the proceedings in this case, that the government had acted wrongly in presenting estimates based on information that the government knew to be inaccurate. The government did not challenge this finding on appeal. Datalect also established that the government's wrongful conduct inflicted an injury on it. The trial court expressly stated: "[T]he court is persuaded that plaintiff incurred monetary injury as a result of defendant's faulty estimate" (Pet. App. 34a).

Once Datalect had established these points, the only remaining task for the courts below was to "make a just and reasonable estimate of the damage based on relevant data" (*Bigelow*, 327 U.S. at 264). "Certainty in the fact of damage is essential. Certainty as to the amount goes no further than to require a basis for a reasoned conclusion."

Palmer, 311 U.S. at 561 (footnote omitted). The Court has been emphatic on this point. "[T]here is a clear distinction between the measure of proof necessary to establish the fact that [a plaintiff] ha[s] sustained some damage and the measure of proof necessary to * * * fix the amount." *Story Parchment Co.*, 282 U.S. at 562. As the Court has explained (*Anderson*, 328 U.S. at 688):

> [T]he rule that precludes the recovery of uncertain and speculative damages * * * applies only to situations where the fact of damage is itself uncertain. * * * [When t]he uncertainty lies only in the amount of damages arising from the statutory violation * * * [i]t is enough * * * if there is a basis for a reasonable inference as to the extent of the damages.

The courts below violated this principle. The trial court explicitly assigned to Datalect the "burden of proving the amount of damages." Pet. App. 17a. The court of appeals agreed, asserting that "Datalect's task at trial was to show by how much it would have benefitted" if the government had acted properly. *Id.* at 12a. Both courts then faulted Datalect because Datalect's evidence did not pinpoint the precise amount of damages. But it is beyond reasonable dispute that Datalect submitted more than enough evidence to provide "a basis for a reasonable inference as to the extent of the damages." *Anderson*, 328 U.S. at 688; see *Bigelow*, 327 U.S. at 264; *Story Parchment*, 282 U.S. at 563.

Without rehearsing all of Datalect's evidence, we offer a few examples. The court of appeals gave two reasons for rejecting Datalect's effort to identify the difference between its actual bid and the bid it would have made if the government had not misled it—first, that Datalect "never produced any evidence as to what estimates the Army would have made if it had not acted negligently"

(Pet. App. 13a); and second, that Datalect's hypothetical prices were based in part on certain assumptions about the mix of hard and easy service calls. Under this Court's decisions, these aspects of Datalect's calculations cannot possibly justify a denial of all damages.[3] Indeed, the supposed shortcomings in Datalect's evidence are parallel to—and much less severe than—the evidentiary gaps that this Court found to be immaterial in the antitrust and copyright cases.

For example, any difficulty in ascertaining "what estimates the Army would have made if it had not acted negligently" was obviously the result of the Army's negligence. But the court of appeals held Datalect responsible —and denied it any recovery—because Datalect did not convince the court of what those estimates would have been. Even apart from the Army's negligent preparation of the estimates, after-the-fact evidence about what the Army's estimates should have been was manifestly within the Army's control. If the government thought that Datalect's calculations overstated the amount of damages, it could have made a showing to that effect. In fact, the Army apparently kept no records of in-house maintenance, even after Datalect brought this suit (see C.A. App. A0088)—thus making it impossible for Datalect to make

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[3] The court of appeals was mistaken for another reason when it asserted that Datalect had to produce evidence of the estimates that the Army would have provided had it acted properly. As the trial court recognized, the Army was under no obligation to revise its estimates so long as it disclosed the information in its possession that rendered those estimates inaccurate. See Pet. App. 50a. Thus Datalect was justified in basing its hypothetical calculations on the information that the Army knew but failed to disclose. Contrary to the court of appeals, at the damages phase of the proceedings Datalect did not have to provide any evidence at all about what the Army's estimates should have been.

the showing that the court of appeals demanded, even if it had been Datalect's responsibility to do so.

Similarly, the court of appeals criticized Datalect for not adjusting its hypothetical prices to reflect uncertainty about the mix of "hard" and "easy" service calls. See Pet. App. 13a-14a. This conclusion, too, simply cannot be squared with this Court's repeated approach to damages. If—as this Court has said—a copyright infringer must bear the burden of separating the element of its profits that is not attributable to its wrongdoing, and an antitrust violator must show which portion of its competitor's lost profits is not attributable to the violation, then plainly the government, not Datalect, should bear the responsibility for adjusting Datalect's damages to reflect a possibly different mix of kinds of service calls.

The court of appeals committed the same error, perhaps even more obviously, when it concluded that Datalect could not rely on a showing of increased costs per call because "Datalect did not present evidence showing that the *entire* decrease in call volume would have been reflected in a nonnegligent estimate" (Pet. App. 14a; emphasis added). The court of appeals never explained—and could not explain, consistent with this Court's decisions—why it was Datalect's responsibility to make that showing. "Where there is a commingling of" losses from legitimate sources and from a legal wrong, it is the wrongdoer who "must abide the consequences, unless he can make a separation * * * so as to assure the injured party all that justly belongs to him." *Sheldon*, 309 U.S. at 406. Here, the court of appeals imposed that burden on Datalect, the injured party, instead of on the wrongdoer.

Datalect submitted much other evidence that the court of appeals either discounted or disregarded. Quite apart from that, however, this case presented, by happenstance,

exceptionally good evidence of the damages suffered by Datalect. That is because, as we have described, Datalect actually prepared a bid on a contract solicitation that resembled the solicitation the Army would have made had it not acted wrongfully. Datalect's bid on the contract containing the $250 minimum order clause was not a hypothetical calculation made in the course of litigation; it was prepared under competitive conditions. This eliminates all speculation about how Datalect would have responded to a solicitation of that kind. Datalect's chairman explained that the minimum order clause, before it was amended, conveyed essentially the same information that the government would have conveyed had it not wrongfully failed to tell Datalect of its in-house repair procedures—specifically, that the Army would do much of the "easy" maintenance work in-house. See Pet. App. 27a; C.A. App. A0852-55.

It is entirely clear that this evidence—quite apart from all of the other evidence that Datalect introduced—provided, at the very least, "a basis for a reasonable inference as to the extent of the damages" (*Anderson*, 328 U.S. at 688). Indeed, it is so clear that Datalect's evidence satisfies this minimal standard that the only concusion one can plausibly draw is that the court below was simpy not applying the proper standard. The court of appeals did, in passing, make a pro forma remark that "damages need not be proved with certainty." Pet. App. 12a. But the lower courts' treatment of Datalect's evidence—together with their explicit assignment to Datalect of the "burden of proving the amount of damages" (Pet. App. 17a; see *id.* at 12a)—shows that they utterly misconceived the standard that applies in a case of this kind.

No doubt in this case, as in many others, the damages award could reasonably have fallen within a certain range. But the award of zero damages made by the courts below

was manifestly not within that range. This award can be understood only as the product of the erroneous view that a plaintiff in Datalect's position bears a burden of proof comparable to that borne by a plaintiff seeking to establish liability. That view is flatly contrary to a long line of decisions by this Court.

2. The court of appeals' decision is also, not surprisingly, inconsistent with the decisions of several other courts of appeals. The Seventh Circuit, for example, has stated: " 'Speculation has its place in estimating damages, and doubts should be resolved against the wrongdoer.' " *BE&K Construction Co. v. Will & Grundy Counties Building Trades Council*, 156 F.3d 756, 770 (7th Cir. 1998), cert. denied, 119 S.Ct. 1336 (1999), quoting *Mid-American Tablewares, Inc. v. Mogi Trading Co., Ltd.*, 100 F.3d 1353, 1365 (7th Cir. 1996), and *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 383 (7th Cir. 1986), cert. denied, 480 U.S. 934 (1987). This statement is impossible to square with the approach taken by the court of appeals in this case, which refused to engage in even limited estimation—let alone speculation—and resolved all doubts in favor of the wrongdoer.

Similarly, in *Kinty v. United Mine Workers*, 544 F.2d 706 (4th Cir. 1976), cert. denied, 429 U.S. 1093 (1977), the plaintiffs were coal mine operators who were damaged by an illegal secondary boycott; they sought, as damages, ten year's worth of estimated future profits. The defendants objected both that the plaintiffs' profit experience was very brief and that "the coal industry is too cyclical an industry to permit such extrapolations." *Id.* at 725. The Fourth Circuit's response is again sharply at odds with the ruling of the court below (*ibid.*):

> Th[e defendants'] argument is not without some force. There has been, however, a violation of plain-

> tiffs' rights by the defendant and the difficulty of calculating loss should not operate to immunize the defendant from liability. The Court, or * * * jury must do the best it can in fixing fairly the damages due these plaintiffs.

Other courts of appeals, following this Court, have adopted the same approach. For example, in *Cunningham v. City of Overland*, 804 F.2d 1066 (8th Cir. 1986), the Eighth Circuit upheld an award of compensatory damages for an unconstitutional deprivation of property. The court specifically noted that the damages calculation failed to account for certain factors that obviously affected the value of the property, "such as location, relative quality of the structures, and fitness of the buildings" for the purposes that the plaintiffs intended. *Id.* at 1070. Nonetheless, the court upheld the damages award on the ground that the *defendants* "failed to offer evidence establishing with any certainty the propriety of a lesser award." *Ibid.* If the Eighth Circuit's approach had been applied in this case, Datalect would have received the full measure of damages it sought, since the government "failed to offer evidence establishing with any certainty the propriety of a lesser award." Instead, Datalect received nothing. The disagreement between the circuits could not be more stark.

The decision below cannot, however, be dismissed as an aberration. At one time, the Court of Claims (a predecessor of the Court of Appeals for the Federal Circuit) did faithfully adhere to the principle that an injured plaintiff does not have the burden of proving the amount of damages. See, *e.g.*, *Petrovich v. United States*, 421 F.2d 1364 (Ct. Cl. 1970). More recently, however, there are indications that the Federal Circuit has systematically been committing errors like those of the panel below, possibly out of excessive solicitude for the interests of the government in cases in which the amount of damages is

difficult to ascertain. For example, in *San Carlos Irrigation and Drainage District v. United States*, 111 F.3d 1557 (Fed. Cir. 1997), the Federal Circuit not only emphasized that "contract law precludes recovery for speculative damages" (*id.* at 1563) but denied damages against the government on the ground that "[a] plaintiff must show that but for the breach, the damages alleged would not have been suffered." *Ibid.* This formulation commits the same error as the panel below: even in cases in which a plaintiff bears the burden of proving that the defendant's wrong damaged it, a plaintiff who has made such a showing does not bear the further burden of proving that its damages calculation is correct. The Federal Circuit's disregard of this important principle—and its increasing tendency to place an unjustified burden on plaintiffs, in violation of this Court's repeatedly stated strictures—warrants further review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

99-5017

DATALECT COMPUTER SERVICES, LTD.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

DECIDED: July 15, 1999

Before BRYSON, *Circuit Judge*, ARCHER, *Senior Circuit Judge*, and GAJARSA, *Circuit Judge*.

BRYSON, *Circuit Judge*.

This government contract case concerns the procurement of computer maintenance services under the requirements contract for United States Army installations in Germany. The contractor contends that the Army breached the contract when it performed maintenance in-house, when it had maintenance performed under warranties, and when it negligently prepared estimates of the maintenance services to be ordered. The trial court held on summary judgment that the Army did not breach the requirements contract by doing maintenance work in-house

or by having maintenance work done under warranty, but that the Army breached the contract by negligently preparing estimates of the maintenance services that would be ordered under the contract. The court awarded no damages for that breach, however, because it ruled that the contractor failed to prove its damages adequately at trial. We agree with the trial court that the in-house maintenance was not a breach and that Datalect failed to make an adequate proof of damages stemming from the negligent estimates. We conclude, however, that the trial court erred in entering summary judgment on the issue of computer warranty maintenance. We therefore *affirm-in-part, vacate-in-part,* and *remand.*

I

In 1992 Datalect Computer Services, Ltd., was awarded a contract to provide computer maintenance services for the United States Army in Germany. The contract contained a requirements clause, which was drawn from 48 C.F.R. § 52.216-21. The clause provided:

> (c) Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies and services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.

The contract was for one year with three one-year extension options, each of which the Army exercised.

When the government enters into a requirements contract, it is required to provide estimates of its prospective requirements during the term of the contract. *See* 48 C.F.R. § 16.503(a)(1). In this case the Army made estimates of the maintenance services it would need based on its past service requirements. Both the Army's esti-

mates and Datalect's bid divided the maintenance calls into categories called Contract Line Item Numbers or CLINs. For example, CPU repairs and printer repairs fell under separate CLINs. The Army estimated that maintenance calls during the first year of Datalect's contract would equal the calls made in the most recent periods for each CLIN. The Army then reduced those numbers by a small percentage for the succeeding option years to take into account the anticipated drawdown of Army personnel in Europe.

One of the CLINs is technical inspection. The contract explicitly provides that the performance of computer maintenance falling within the technical inspection CLIN is shared between Datalect and the Army:

> The contractor shall provide [technical inspection] support at the user's location for all types of computer equipment listed in the equipment listing. . . . This shall not be construed to mean that the contractor has exclusive rights to perform technical inspections. The Government reserves the right to perform or have the 5th Signal Command Area Maintenance and Supply Facility (AMSF) perform technical inspections as required.

In its initial bid, Datalect specified a price per call for each CLIN. After that bid was submitted, the parties negotiated a change in the minimum order clause. The minimum order clause originally provided as follows:

> (a) Minimum order. When the Government requires supplies or services covered by this contract in an amount of less than $250.00, the Government is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract.

The parties agreed to modify that clause by reducing the $250 minimum to $1. Both parties agree that there are no supplies or services in an amount of less than $1 contemplated under the contract. In its subsequent bid Datalect significantly reduced its price per call for the various CLINs. In a letter accompanying its amended bid, Datalect explained that the price reductions were attributable to the change in the minimum order clause. Based on the amended bid, the Army awarded Datalect the contract.

In the first year of the contract the number of the Army's maintenance calls to Datalect across all the CLINs was only about 50 percent of the number estimated in the contract. The number of calls in subsequent option years was comparable to the number in the first year and again differed substantially from the government's pre-contract estimates. Because Datalect was paid by the call, it received much less revenue than it would have if the estimated number of calls had been made. Datalect complained to the Army that the call volume was low and that Datalect was receiving only the more difficult service calls. Datalect contended that the Army had trained its Information Management Officers (IMOs) to do the easier maintenance work, which the Army was contractually required to refer to Datalect. Datalect submitted a claim to the contracting officer for the revenue it would have received if the call estimates had been met. The contracting officer denied the claim, and Datalect brought suit in the Court of Federal Claims.

In the trial court Datalect argued that the Army breached the contract in three ways: (1) by allowing IMOs to perform maintenance instead of ordering that maintenance work from Datalect; (2) by ordering maintenance work under extended warranties rather than having Datalect do that work; and (3) by failing to take

reasonable care in preparing the pre-contract estimates of the amount of work that Datalect could expect under the contract.

The parties filed cross-motions for summary judgment on liability, and the trial court granted each motion in part. With respect to the in-house and warranty maintenance work, the court held that the requirements clause did not cover those services, because the clause refers to services "that are required to be purchased." The court held that the Army was not required to "purchase" maintenance services when its own employees made the necessary repairs or the repairs were covered by warranty. With respect to the claim regarding the pre-contract estimates, however, the court agreed with Datalect that the Army had breached is contractual duty to take reasonable care in formulating the estimates of the number of calls that would be required. The case then proceeded to trial on damages for that breach.

At the damages trial, Datalect presented two theories of recovery. Its preferred approach was to reform the contract to reflect new prices for each CLIN and to award Datalect the difference between the new price and the actual price for each CLIN, multiplied by the number of service calls that Datalect received. Its alternative approach was to multiply its fixed costs by the ratio of the estimated but not ordered quantities over the estimated quantities.

The trial court refused to award damages because it found that Datalect's proof of damages was insufficient. On appeal, Datalect challenges the trial court's partial summary judgment on liability and its refusal to award damages.

II

A

On the issue of liability, Datalect first challenges the trial court's interpretation of the requirements clause as allowing in-house maintenance. The court's interpretation, Datalect argues, is inconsistent with three provisions of the contract—the schedule of services, the minimum order clause, and the technical inspections clause.

Datalect argues that the requirements clause applies to everything listed in the schedule of services, which includes all maintenance of covered equipment except as expressly provided. As the trial court correctly held, however, the requirements clause specifically limits the reach of the contract to those services "that are required to be purchased by the government." The "required to be purchased" proviso thus defines the class of services, within the schedule of services, that the Army was contractually obligated to obtain from Datalect.

Datalect next contends that the minimum order clause indicates that in-house maintenance was not allowed under the contract except to the extent that the contract specifically permitted it. The standard minimum order clause in the Federal Acquisition Regulation (FAR) states that the government is not obligated to order services under the contract where the order is less than a minimum amount. *See* 48 C.F.R. § 52.216-19. Datalect argues that the clause would be meaningless if the Army were permitted to do its own in-house maintenance regardless of the cost, and that the requirements clause therefore must be interpreted to forbid in-house maintenance. Datalect's argument is unpersuasive. The minimum order clause allows the government to contract with third parties when computer maintenance needs to be purchased

but is below the minimum amount. The clause is therefore not meaningless under the trial court's construction of the requirements clause, because it governs the right of the government to use other suppliers for maintenance calls even if it does not limit in-house maintenance.

Datalect makes a similar argument regarding the technical inspection clause. Datalect points to language in that clause permitting the government to use its own personnel to perform technical inspections. Datalect contends that the trial court's interpretation of the requirements clause as permitting all in-house maintenance is inconsistent with the specific reservation in the technical inspection clause. That argument, however, ignores the structure of the technical inspection clause.

The sentence of the technical inspection clause that permits the government to conduct technical inspections begins: "This shall not be construed to mean. . . ." That introductory clause indicates that the reservation was made necessary by the first sentence of the technical inspection clause itself, not by the obligations of the requirements clause. The terms of the technical inspection clause actually support the trial court's interpretation of the requirements clause, because the reservation sentence refers only to the first sentence of the technical inspection clause, implying that there is no need to reserve the in-house inspection right with respect to the overall requirements clause obligations.

Finally, Datalect argues that the Army's decision to use the standard requirements clause in the FAR, rather than an alternate clause, shows that the contract did not permit in-house maintenance. The FAR contains two clauses for use in requirements contracts: the standard one used in Datalect's contract and an alternate clause. The alternate clause reads:

> If the requirements contract is for nonpersonal services and related supplies and covers estimated requirements that exceed a specific Government activity's internal capacity to produce or perform, substitute the following paragraph (c) for paragraph (c) of the basic clause:
>
> (c) The estimated quantities are not the total requirements of the Government activity specified in the Schedule, but are estimates of requirements in excess of the quantities that the activity may itself furnish within its own capabilities. Except as this contract otherwise provides, the Government shall order from the Contractor all of that activity's requirements for supplies and services specified in the Schedule that exceed the quantities that the activity may itself furnish within its own capabilities.

48 C.F.R. § 52.216-21. Datalect argues that the government could not have intended to permit in-house maintenance services because if that was its intent it would have used the alternate clause rather than the standard clause.

The alternate requirements clause appears to be addressed primarily to goods and services that a government agency produces other than for internal consumption. In any event, it is not clear that the alternate requirements clause was meant to be used whenever an agency intends to obtain services by contract while continuing to perform some of the covered services in-house. For that reason, the use of the standard requirements clause does not compel the conclusion that the parties meant to foreclose the use of any in-house maintenance services.

During oral argument Datalect stated that the Army has included the alternate requirements clause in the con-

tract that followed Datalect's contract. There is no evidence in the record with respect to that factual assertion. Even if we could consider the subsequent contract, however, it would not change our conclusion with regard to that issue. The Army used the alternate clause after the dispute with Datalect had arisen. The Army's attempt to forestall future litigation does not imply that it intended to bar in-house maintenance under the Datalect contract.

In holding that the requirements clause did not preclude in-house maintenance, the trial court relied upon the express terms of the clause, which included only services that were "required to be purchased," and thus excluded maintenance that the Army could perform without making a purchase of services. We agree with the trial court's interpretation of the requirements clause as applied to the in-house maintenance issue, and we agree with the trial court that the other provisions of the contract on which Datalect relies do not require a contrary interpretation.

B

The second activity that Datalect characterizes as a breach was the Army's practice of obtaining service on new computers pursuant to warranties rather than using Datalect to service those computers. The trial court concluded that obtaining service under a warranty did not constitute a "purchase" of maintenance services and that the Army was therefore not obligated by the requirements clause to order such maintenance services from Datalect. When an agreement "is clearly stated and understood by the parties, it is enforced according to its terms." *Pagan* v. *Department of Veterans Affairs*, 170 F.3d 1368, 1371 (Fed. Cir. 1999). Having found that the language clearly resolved the issue, the trial court did not assess the intent of the parties.

We agree with Datalect that the trial court's interpretation of "purchase" is too narrow. The trial court's construction would allow the Army to arrange for parties other than Datalect to handle all of its computer maintenance needs simply by purchasing lengthy warranties with its computer equipment. Indeed, the trial court's interpretation would seem to permit the government to use third parties to provide maintenance service, even apart from new-product warranties, as long as the service arrangements were made prospectively. We conclude that the terms of the requirements clause do not clearly state the broad exception urged by the government.

To exclude all warranties and prospective service arrangements from the definition of "purchase" is too restrictive, at least in the absence of evidence that the parties intended such narrow definition. *See Pagan* 170 F.3d at 1371 ("If any ambiguity is found, our role is to implement the intent of the parties at the time the agreement was made."). The common understanding of a "purchase of a service" includes paying in advance for the service to be performed if and when it becomes necessary. If the Army paid a third party to provide maintenance during the term of Datalect's contract and the third party provided maintenance on a computer covered by the contract, then (in the absence of evidence of the parties' contrary intent) that service would be covered by the requirements clause of Datalect's contract even though the purchase occurred prior to the maintenance.

The government argues that we should affirm the trial court's judgment on the ground that the parties intended to exempt maintenance on equipment under warranty from the requirements clause obligations. The government seeks support in a statement made by Datalect in a proposal submitted after the amended bid. In a paragraph entitled

"Equipment Under Warranty," Datalect stated "Datalect will, in conjunction with the US Government, negotiate a practical solution to failed equipment still in warranty." The government also asserts generally that a reasonable contractor would not expect the government to pay for maintenance that could be performed for free under a warranty. Datalect responds to both points by distinguishing between warranties entered into before and after the start of the contract. Datalect interprets the proposal statement as referring only to pre-existing warranties and argues that the Army was not free to obtain new warranties or negotiate to extend pre-existing warranties without violating the requirements clause of the contract.

To the extent that the parties' arguments on these issues turn on questions of the parties' intent at the time they entered into the contract, we do not address them. Because the trial court is in a better position to consider those arguments, we decline to rule on them in the first instance.

In opposing the government's summary judgment motion, Datalect argued that the Army separately negotiated and paid for warranty coverage when it bought computers. Datalect identified a specific contract between the Army and a computer supplier in which the Army initially negoiated for and purchased a two-year warranty, later purchased a third year of warranty coverage, and still later negotiated for and obtained a further two-year extension. Datalect contended that those warranty contracts covered a substantial number of new computers purchased by the Army during the contract term.

We conclude that Datalect raised a disputed factual issue as to whether the Army purchased warranties under which it procurred maintenance services during its contract with Datalect. Under our interpretation of the re-

quirements clause, this disputed fact is material because, in the absence of evidence establishing that the parties intended otherwise, maintenance that is "required to be purchased" includes maintenance that is performed by third parties under a warranty purchased by the government. The trial court therefore erred in granting summary judgment on this issue.

III

Datalect next challenges the trial court's refusal to award damages after trial. Datalect notes that the amount of damages need not be proved with certainty and that a fair and reasonable approximation should be accepted by the trial court. *See, e.g., S.W. Elecs. & Mfg. Corp.* v. *United States,* 655 F.2d 1078, 1088 (Ct. Cl. 1981). Datalect then submits that both of its damages theories met that standard. We agree with the trial court that the flaws in Datalect's proof of damages went beyond lack of mathematical precision. The problem is that Datalect's damages evidence was not sufficiently related to the only breach at issue, the government's negligent estimates.

The damages trial proceeded from the summary judgment of liability for negligently preparing estimates. *Datalect Computer Servs., Ltd.* v. *United States,* 40 Fed. Cl. 28, 41 (1997) ("What the court finds objectionable in this case is not the performance of the in-house maintenance or the use of extended warranties, but the failure of the government to account for these, and other, known factors in its original estimate."). The government has not challenged that aspect of the trial court's liability determination. Datalect's task at trial was to show by how much it would have benefited if the Army had taken the available information into account in formulating the contract estimates.

Datalect's first theory of damages was to reform the contract to reflect what Datalect would have bid on each of the CLINs and then determine the difference between those hypothetical prices and the actual prices contained in the contract. In order for the damages to be related to the breach, the hyopthetical prices had to reflect what Datalect's reaction would have been to nonnegligently prepared estimates. Datalect, however, never produced any evidence as to what estimates the Army would have made if it had not acted negligently. As a consequence, Datalect's evidence that sought to establish the bid it would have made fails to provide the basis for a damages award.

Even assuming that the estimates Datalect considered in formulating its hypothetical prices accurately reflected the estimates the Army would have provided had it exercised reasonable care, Datalect failed to show that its damages were the necessary result of the Army's breach. Each of its witnesses who testified about the hypothetical prices admitted that those prices were calculated based in part on factors unrelated to the breach found by the trial court. William Fattal, the chairman and director of Datalect during the contracts bids and negotiations, testified about the method that Datalect had used to set the hypothetical prices. He admitted that the hypothetical prices were based in part on the assumption that the Army would have disclosed to Datalect the mix of "easy" and "hard" calls that made up the estimates. Similarly, Datalect witness Alfie Karmal testified that the mix of calls was crucial to the calculation of the hypothetical prices, yet he admitted that the CLIN estimates did not indicate that mix, because each CLIN could include both "easy" and "hard" calls. Datalect witness Nigel Mills also acknowledged that the estimates addressed only the number of calls, and he admitted that the call rate alone was insufficient to deter-

mine the profitability of the contract. The trial court did not base its finding of breach on a failure by the Army to advise Datalect of the relative difficulty of the calls it could expect to receive. For that reason, the evidence of Datalect's proposed pricing differential, which was based in part on the difficulty of the calls, was not responsive to the breach to which the calculation of damages was supposed to be addressed.

Datalect based its alternative damages theory on a formula derived from *Wheeler Bros., Inc.*, 79-1 B.C.A. (CCH) ¶ 13,642, at 66,917 (ASBCA 1979). In *Wheeler* the government admitted diverting a specific portion of its requirements to others in violation of the contract. The issue in *Wheeler* therefore was how to calculate the contractor's damages under those circumstances. The Board allowed the contractor to apportion its overhead expenses between the work it did and the work that was improperly diverted. The amount applicable to the improperly diverted work was then awarded to the contractor as an equitable adjustment.

We reject Datalect's argument that it was appropriate to use the *Wheeler* formula in this case. Datalect seeks an equitable adjustment based on an improper diversion of requirements, but the contract explicitly provided that an error in the requirements estimate would not entitle Datalect to an equitable adjustment. The predicate for damages was the negligent estimate, not the improper diversion of requirements. Datalect bore the risk that a nonnegligent estimate would differ from the actual volume of calls. *See Medart* v. *Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992). Datalect did not present evidence showing that the entire decrease in call volume would have been reflected in a nonnegligent estimate. For that reason, the

trial court correctly refused to assess damages on the basis of Datalect's "diverted service" theory of recovery.

Finally, Datalect argues that even the government's expert testified to an amount of damages that Datalect incurred as a result of the government's breach. The testimony to which Datalect refers, however, was explicitly predicated on assumptions that the expert disputed. The expert's ultimate opinion was that Datalect had failed to show that it was entitled to damages.

Each party shall bear its own costs for this appeal.

APPENDIX B

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 95-328C

(FILED: September 15, 1998)

DATALECT COMPUTER SERVICES, LTD.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

Duty of Care in Preparing Estimate of Requirements; Damages

ORDER

TIDWELL, *Senior Judge:*

This case is before the court following trial on quantum, held June 1 to June 5, 1998 in London, England. On December 18, 1997, the court granted in part and denied in part defendant's motion for summary judgment as to entitlement and damages, and granted in part and denied in part plaintiff's cross-motion for partial summary judgment as to entitlement. The court found that defendant

negligently prepared the statement of estimated needs in a requirements contract for computer repair services. In the damages phase of trial, plaintiff sought to recover DM 6,285,445 under a contract reformation theory and, in the alternative, DM 3,773,324 under an "increased cost" theory.[1] Defendant argued that plaintiff did not detrimentally rely on the estimate in preparing the bid and was therefore not entitled to recover damages. For the reasons discussed herein, the court finds that plaintiff has failed to meet its burden of proving the amount of damages.

BACKGROUND

A detailed account of the facts surrounding this case can be found in the court's liability opinion, *Datalect Computer Serv's Ltd. v. United States*, 40 Fed. Cl. 28 (1997). A brief summary of relevant facts is provided below as background. The court's factual findings on quantum are contained in the Discussion section of this opinion.

On July 23, 1992, the U.S. Army Europe (USAEUR) issued an invitation for bids ("IFB") for the maintenance and repair of government-owned "tier-III" (freestanding, office-based, personal) computer equipment in Germany, Belgium, the United Kingdom and Italy (Blocks A, B, and C respectively). On February 5, 1993, USAREUR executed requirements contract No. DAJA37-93-D-0065 with plaintiff, Datalect Computer Services, Ltd. ("Datalect"), a corporation organized under the laws of the United Kingdom. In order to perform the contract, plaintiff established an office in Germany.

The solicitation required Datalect to submit individual unit contract line item number ("CLIN") prices for nu-

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[1] Plaintiff's damages claims were expressed in German deutschemarks throughout the litigation.

merous repair functions. The contract, for a one-year term with three one-year options, began in March of 1993. Defendant exercised all of the options, and performance continued through March, 1997.

Pursuant to 48 C.F.R. § 16.503(a)(1) (1996), the IFB and resulting contract contained an estimate of the government's requirements based on the historical workload. This dispute arose when the quantity of actual service calls was significantly less than the estimated quantity of services stated in the solicitation. During the first four to six months of the contract, Datalect complained to the Army of a reduced call rate. The historical workload was 60 to 65 service calls per business day, while the actual service call rate under the Datalect contract fluctuated between 25 and 45 service calls per day.

On March 17, 1995, after several letters requesting information from USAREUR on the reduced call rate, plaintiff submitted a claim to the Army for an equitable adjustment based upon its assertion that the Army breached the contract by (1) failing to disclose all relevant facts necessary for Datalect to accurately prepare its bid and (2) failing to utilize Datalect to provide all of the government's requirements under the contract. Datalect claimed that its reliance on the government's estimated needs resulted in Datalect's bid being "unrealistically low" to the detriment of Datalect and to the benefit of USAREUR. On March 27, 1995, defendant denied Datalect's claim, finding that the estimated quantities in the solicitation were based on the most current information available.

Plaintiff filed a complaint in this court on May 8, 1995, seeking damages of DM 3,872,847 in compensation for its lost revenue, plus costs, and an injunction to prevent defendant from diverting service calls to its own main-

tenance facilities. Plaintiff argued that defendant breached its duty to consider certain relevant information when compiling the workload estimates, including: (1) the impending troop drawdown; (2) plans to purchase new computer equipment with extended warranties; and (3) the intention to perform self-maintenance. Plantiff also argued that defendant breached the contract, depriving Datalect of service calls, by performing self-maintenance and utilizing extended warranty agreements on new computers. Defendant filed a motion for summary judgment as to both entitlement and damages. Plaintiff responded with a cross-motion for partial summary judgment as to entitlement.

In preparing a solicitation, the government is bound by a rather simple good faith standard which requires it to seek the most current information available, and either reformulate its estimate when warranted by the information available, or notify offerors of situations or factors likely to affect the estimate. *See* 48 C.F.R. § 16.503(a)(1) (1996); *see also Medart, Inc. v. Austin*, 967 F.2d 579, 582 (Fed.Cir.1992) (in formulating its estimate, the government must take into account information "reasonably available" to it). The estimate need not be exact, or even accurate, as long as it provides bidders with a fair opportunity to reasonably formulate their bids. In the liability phase, the court ruled that defendant was negligent in preparing its estimate because it failed to consider and disclose available information that was likely to affect the estimate. *Datalect*, 40 Fed. Cl. at 35. The court also held that the government did not breach the requirements contract by performing in-house maintenance and utilizing extended warranty arrangements for tier-III maintenance and repair, because it was only required to utilize Datalect's services when it had a need to purchase such serv-

ices, i.e. when it could not perform the work in-house or under warranty. *Id.* at 41-42.

The parties were directed to attempt to negotiate a settlement to the amount of damages. When those efforts failed, the damages issue was tried.

DISCUSSION

The party claiming entitlement to an equitable adjustment bears the burden of establishing the amount of the adjustment. *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1392 (Fed.Cir.1987); *Nager Elec. Co. v. United States,* 194 Ct. Cl. 835, 853, 442 F.2d 936, 946 (1971). Thus, plaintiff herein bears the burden of proving, by a preponderance of the evidence, both the reasonableness of the costs claimed and their causal connection to the alleged events on which the claim was based. *S.W. Elecs. & Mfg. Corp., ASBCA* 20698, 77-2 BCA ¶ 12,631, *aff'd,* 655 F.2d 1078 (1981). This burden, however, does not require a claimant to prove his damages with absolute certainty or mathematical exactitude. *Dale Constr. Co. v. United States,* 168 Ct. Cl. 692 (1964); *Houston Ready-Cut House Co. v. United States,* 119 Ct. Cl. 120, 96 F. Supp. 629 (1951). In *Wunderlich Contracting Co. v. United States,* 173 Ct. Cl. 180, 351 F.2d 956 (1965), the court observed:

> It is sufficient if [claimant] furnishes the court with a reasonable basis for computation, even though the result is only approximate. *F.H. McGraw & Co. v. United States,* [131 Ct. Cl. 501, 130 F.Supp. 394 (1955)]; *Locke v. United States,* 151 Ct. Cl. 262, 283 F.2d 521 (1960). Yet this leniency as to the actual mechanics of computation does not relieve the contractor of his essential burden of establishing the fundamental facts of liability, causation and resultant

> injury. *River Construction Corp. v. United States,* [159 Ct. Cl. 254 (1962)]; *Addison Miller, Inc. v. United States,* 108 Ct. Cl. 513, 70 F. Supp. 893 (1947) . . . *J.D. Hedin Construction Co., Inc. v. United States* [171 Ct. Cl. 70, 86-87, 347 F.2d 235, 246-247 (1965)]. It was plaintiffs' obligation in the case at bar to prove with reasonable certainty the extent of unreasonable delay which resulted from defendant's actions and to provide a basis for making a reasonably correct approximation of the damages which arose therefrom. *Aragona Construction Co., Inc. v. United States* [165 Ct. Cl. 382 (1964)]; *Laburnum Construction Corp. v. United States,* [163 Ct. Cl. 339, 325 F.2d 451 (1963)]. Broad generalities and inferences to the effect that defendant must have caused some delay and damage because the contract took 317 days longer to complete than anticipated are not sufficient. *Commerce International Co., Inc. v. United States,* [167 Ct. Cl. 529, 338 F.2d 81 (1964)].

Wunderlich, 351 F.2d at 968. *See American Line Builders, Inc. v. United States,* 26 Cl. Ct. 1155, 1181 (1992).

Plaintiff's Case-in-Chief

At trial plaintiff presented two alternative claim calculation theories. Plaintiff's contract reformation theory was based on the difference between what it actually received under the contract and what it would have received if defendant had properly disclosed its estimated requirements. Datalect argued that if the estimate had been properly formulated, it would have bid substantially more for all of the CLINs because it would have known that there would be fewer total calls and that each call would be more expensive to service. Under the contract reformation theory, Datalect sought the difference between the revenue

it actually received under the contract and the revenue it would have received, at the increased CLIN prices. Plaintiff alleged that this difference would amount to an additional payment of DM 6,285,445.

Plaintiff's alternative theory of damages was under an "increased costs" theory based upon a formula found in *In re Wheeler Bros.*, 79-1 B.C.A. (CCH) ¶ 13,642 (1979) (No. 20465). Plaintiff calculated equitable adjustments to the fixed costs, spare parts costs, and the profit margin on those costs. Under this theory, plaintiff alleged that it was entitled to an additional DM 3,773,324 as a result of the negligent estimate.

Mr. William Fattal, chairman and director of Datalect, testified that Datalect had been in the business of servicing computer equipment in the United Kingdom since 1983, and generally provided repair services on a fixed price basis. To determine repair costs, Datalect maintained a database of statistical information on repair rates for computer equipment, and used this information to formulate bid prices. The CLIN bids were actually prepared by Mr. Peter Watts, then in plaintiff's employ.

Mr. Fattal testified that shortly after Datalect began performing the Army contract, it realized that it was not receiving the expected rate of service calls. On October 24, 1994, Mr. Fattal wrote a letter to Mr. James Demetroulis, the Administrative Contracting Officer at USAEUR, complaining about the government in-house maintenance efforts; the cannibalization of computer parts, resulting in service calls involving machines with missing parts; and service calls involving machines with multiple part failures.

Mr. Demetroulis responded to Mr. Fattal's letter on November 22, 1994. He agreed to consider reimbursing

plaintiff for repairs involving multiple, unrelated part failures where it was clear that the failures were not due to normal wear and tear. In cases of cannibalization, Mr. Demetroulis requested that Datalect bill the call as a technical inspection and report the incident to the Army for investigation. Mr. Demetroulis also reiterated the government's position that the contract only required the government to call on Datalect when it needed to purchase goods and services. Mr. Demetroulis speculated that the reduced call rate was due to the purchase of 8,000 new tier II systems with three year warranties, the disposal of 3,000 obsolete machines, and the Army's closure of several facilities.

Mr. Fattal testified that Datalect did not account for three-year warranties in preparing its bid because such extended warranties were unprecedented in the computer industry in 1993. Mr. Fattal also testified that Datalect was not informed and was not aware of the government's self-maintenance program when it prepared its bid. According to Mr. Fattal, Datalect interpreted the contract to mean that Datalect would get all service calls, not merely those for which the government could not repair itself. Mr. Fattal alleged that this belief was bolstered when the government changed the minimum order provision. Initially, the solicitation stated:

> (a) Minimum order. When the Government requires supplies or services covered by this contract in an amount of less than $250.00, the Government is not obligated to purchase, nor is the contractor obligated to furnish, those supplies or services under the contract.

This provision was amended on January 18, 1993 to read as follows:

> (a) Minimum order. When the Government requires supplies or services covered by this contract in an amount of less than $1.00, the Government is not obligated to purchase, nor is the contractor obligated to furnish, those supplies or services under the contract.

Mr. Fattal testified that Datalect materially altered its bid in response to this amendment. Datalect believed that this amendment virtually guaranteed that the government would do none of its own repairs and that Datalect would be called for even the simplest repairs. As a result, Datalect dramatically reduced its prices. The reasoning behind this price revision, according to Mr. Fattal, was that after the amendment, Datalect could reasonably expect to get all of the estimated calls on each item, not merely those in an amount less than $250.00. The additional calls would be "easy," less costly calls and the added volume would enable one engineer to service several calls in one site visit. Moreover, plaintiff's overhead costs would be defrayed among more calls, lowering the overhead charged against each call. Datalect's cost per call would be lower and the anticipated savings were reflected in the revised prices.

Mr. Alfie George Karmal, Datalect's sales and managing director, testified that he was plaintiff's sales director when the Army contract began. He reported directly to Mr. Peter Watts and was familiar with the proposal that was submitted to the Army.

Mr. Karmal testified that he "oversaw the interface between the sales team and Peter Watts, [and] was very much involved in all the calculations based upon key ratios within the business from [a] service and delivery perspective." (Tr. 6/1/98 at 205). Mr. Karmal also testified that Datalect relies on a statistical database of repair

frequency to formulate its bid prices. He also corroborated Mr. Fattal's testimony that the change in the minimum order provision materially impacted Datalect's assumptions regarding the CLIN prices and prompted plaintiff to drop their prices by approximtely 40%. He testified that Datalect was not aware of the government's self-maintenance program and that if Datalect had known of the self-maintenance, it would have bid the contract differently. Mr. Karmal also testified that Datalect was not advised that the Army would purchase new computers covered by extended warranties. If Datalect had been advised of these purchases, it would have submitted higher CLIN bids.

Mr. Karmal testified that plaintiff priced blocks A and B together and block C separately. Blocks A and B were priced together with the expectation that plaintiff would be awarded both blocks. Block C, involving Army installations in Italy, was separately priced because it carried higher costs. Mr. Karmal testified that he was aware that the government could award Datalect one, two, or all three blocks. He believed, however, that Datalect could refuse to accept a block, despite the fact that the solicitation did not recognize a right to refuse performance. Mr. Karmal testified that Datalect's bid was based on its expectation that there would be a high call density at each Army facility. Datalect planned to maximize the productivity of its engineers by having them service multiple calls per site visit.

Mr. Karmal did not provide testimony regarding Datalect's claim calculation theories and apparently was not involved in their development.

Mr. Nigel Mills, Datalect's technical director, likewise testified that Datalect maintains a computer database of statistics relating to computer repair services. These statistics include call frequency, system failure rate, the

nature of repairs, and staffing information; and Datalect ordinarily relies upon these statistics to formulate its bid prices. Mr. Mills outlined the staffing requirements for a typical service contract, the average time required to service a call, and the average failure rates for various system components. Mr. Mills, however, was not involved in preparing the Army bid, had no specific knowledge of the German operation, and played no role in formulating Datalect's claim calculation theories.

Mr. Michael Barford, a chartered accountant in England, provided expert testimony on behalf of plaintiff. Mr. Barford reviewed plaintiff's claim calculations and testified that they were properly calculated, "based upon the assumptions which lie behind some of them." (Tr. 6/2/98 at 297-298). Mr. Barford, however, did not develop the claim calculations or the assumptions behind them, and he did not determine how individual costs would be classified. Rather, the claim calculations were performed by Datalect and reivewed by Mr. Barford, who had "some input" in adjusting the numbers. (Tr. 6/2/98 at 311-313). In conducting his review, Mr. Barford visited Datalect on several occasions and held discussions with Mr. Fattal and "other employees of Datalect." (Tr. 6/2/98 at 296). Mr. Barford reviewed the books and records of the company, but he did not perform an audit. Moreover, he did not review, or even consider, the historical database referenced by plaintiff's other witnesses.

Plaintiff's Contract Reformation Theory

Datalect presented a claim calculation purportedly based on the difference between what it actually received under the contract and what it would have received if defendant had properly disclosed its estimated requirements. Datalect premised this calculation on an undated cash flow

statement that was allegedly attached to plaintiff's November 1992 bid. (Plaintiff's Exhibit 5). This cash flow statement purported to demonstrate the cost and profit assumptions behind Datalect's original CLIN prices prior to the change in the minimum order provision. Plaintiff contends that the original CLIN prices more accurately reflect Datalect's pricing than the BAFO prices because, according to plaintiff, the BAFO prices were based on the mistaken belief that Datalect would perform all of the government's repairs. Datalect contends that even the original CLIN prices must be increased to cover the government's negligence in preparing the estimate.

Datalect's claimed CLIN prices purport to demonstrate what Datalect would have bid if the government's estimate had been properly reported. The revised CLIN prices were derived from the undated cash flow statement by making various adjustments to account for an anticipated annual call volume of 8,500. Thus, the total number of employees was reduced by 40%; "fixed costs" were reduced by approximately 30%; "variable costs" were reduced by approximately 50%; and "parts costs" were reduced by approximately 50%.[2] Datalect retained a 22.84% profit margin and distributed the additional costs over the projected number of calls.[3] This resulted in an increase in CLIN prices of 26.35%. The revised CLIN prices were then multiplied by the actual number of service calls to arrive at an adjusted revenue figure.

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[2] Defendant's expert witness, Mr. David Cotton, raised substantial questions regarding individual components of Datalect's hypothetical bid calculation. Mr. Cotton noted that several costs Datalect identifies as "fixed costs" appear to be variable costs. The distinction between fixed and variable costs is examined under plaintiff's increased costs claim calculation.

[3] Datalect's profit margin is expressed as a percentage of total revenues rather than costs.

Plaintiff's claim is for the difference between adjusted revenue and actual revenue.

Datalect's contract reformation claim calculation is fundamentally flawed. First, plaintiff provided no credible evidence to demonstrate how the original CLIN prices were formulated. While Datalect prides itself on maintaining a database of statistical repair data that it uses in bid preparation, plaintiff declined to share this vital information with the court. Instead, plaintiff produced a cash flow statement that purports to demonstrate projected expenses and projected revenues. It provides little or no support for plaintiff's original CLIN prices. Mr. Fattal admitted that the CLIN bid prices were independently derived by Mr. Peter Watts prior to the creation of the cash-flow statement. This is significant because the factors supporting the original CLIN bid prices necessarily impact how the bid would change if the government had properly disclosed its estimated requirements. While Datalect seeks a universal price adjustment, plaintiff has provided no support for its assumption that proper disclosure of the government's requirements would have a uniform impact on all CLIN bid prices. Clearly, Datalect's CLIN bid prices were not formulated by dividing expected revenue by the expected number of calls. Datalect's universal price adjustment, therefore, does not accurately reflect Datalect's damages.

Second, the touchstone of plaintiff's contract reformation theory is the assumption that anticipated call volume in the first year of the contract would have been approximately half the number of calls the prior contractor received in fiscal year 1991. Thus, plaintiff contends that if it had been advised: (1) that the government was planning to do significant self-maintenance; (2) that the government would purchase new computers covered by extended warranties, and (3) that there was an impending

troop drawdown; it would have projected a reduction in call volume of more than 50%. The problem with this assumption is that plaintiff has failed to provide any credible evidence to support it. In fact, Mr. Fattal candidly admitted that the 8,500 estimated calls per year that plaintiff used in the claim calculation was not the work of Peter Watts, who formulated Datalect's original bid, or an expert in bid preparation, but a product of hindsight, "I think in reality we used a bit of hindsight as well in the knowledge that it reduced [actual call volume] by about 50 percent . . . ." (Tr. 6/1/98 at 148). In fact, in the first year of the contract Datalect received 9,725 calls.

Third, plaintiff's rationale for reverting to its original bid is that these prices more accurately reflect Datalect's pricing when it believed that the government would perform some of the calls less than $250. Further adjusting these prices to account for the government's failure to inform Datalect of its self-maintenance program is, at least to some degree, redundant. Mr. Fattal admitted that Datalect's original prices were based on the belief that it would not get all of the calls below the $250 minimum order provision while Datalect's revised prices were based on the belief that they would get virtually all of the call volume. The actual bid prices, therefore, are a more logical point from which to adjust the CLIN prices to account for defendant's negligent estimate.

Finally, the government successfully impeached Mr. Fattal's credibility regarding the technical aspects of bid preparation. Mr. Fattal testified that the claim calculation numbers were prepared by Datalect's accountant at Mr. Fattal's direction. Mr. Fattal was responsible for devising the assumptions behind the claim calculation. He began with the presumption that call volume would drop by half and that resources would drop accordingly. In some cases this resulted in a 50% drop in resources, in other cases,

the reduction was significantly less.[4] With Mr. Fattal's presumptions, the accountant calculated the numbers that appear in Plaintiff's Exhibit 14. Mr. Fattal, however, admitted that he had no technical familiarity with computer repair or bid preparation. He was not involved in the day-to-day operations of Datalect and had no specific knowledge of how the Army contract was prepared. Instead, Mr. Peter Watts, a former employee of Datalect, was responsible for all day-to-day operations in 1993. It was Mr. Watts who was familiar with Datalect's database and it was he who prepared the original bid. At one point, when the government pressed Mr. Fattal for technical details, he explained:

> . . . now I'm not Mr. Watts, I'm not a technical expert on this, but he [Mr. Watts] would have looked at that . . . to determine what price he [Mr. Watts] would put on that particular CLIN rate.

(Tr. 6/1/98 at 64). Given Mr. Fattal's complete lack of familiarity with the formulation of the original bid and the speculative nature of Datalect hypothetical bid, the court finds plaintiff's contract reformation theory unreasonable.

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[4] Mr. Fattal did not apply technical knowledge in forming these assumptions. For example, Mr. Fattal testified that at a call volume of 17,000, Mr. Watts planned on using 18 engineers. If the call volume dropped to 8,500, Mr. Fattal estimated he would need 10 engineers. Mr. Fattal explained his methodology as follows:

> I took of from . . . what is, to me, a fairly logical extension that if you do accept that the number of calls reduces by half, then the resources you would need are considerably reduced, reduced from 35 people down to 21, some people you can't say, you know, take off, you know, like instead of three core controllers we end up with two. You can't end up with one and a half, and you wouldn't be able to do with one, that would be too low.

(Tr. 6/1/98 at 81).

Increased Cost Claim Calculation

Mr. Barford explained that Datalect's increased costs theory is based upon a formula found in *In re Wheeler Bros.*, 79-1 B.C.A. (CCH) ¶ 13,642 (1979) (No. 20465). Plaintiff calculated equitable adjustments to the fixed costs, spare parts costs, and the profit margin on those costs. According to Mr. Barford, Datalect's increased cost calculation is designed to account for damages resulting from the diminished call volume by apportioning Datalect's fixed costs over anticipated revenue to identify the fixed costs that plaintiff anticipated would be offset by revenue that was never actually received. Thus, for fixed costs, Mr. Barford applied the following equation:

Where: R_a=Actual Revenue
R_e=Estimated Revenue
C_f=Actual Fixed Costs

Mr. Barford testified that "[f]ixed costs are costs which tend not to move with the level of activity of the business." (Tr. 6/2/98 at 304-305). To determine which costs were fixed costs, Mr. Barford relied upon Plaintiff's Exhibit 14. Mr. Barford calculated a fixed cost adjustment of DM 1,919,234. Mr. Barford then modified the *Wheeler* formula in an effort to account for Datalect's claim that its average parts costs per call were greater than expected. Thus, for parts costs, Mr. Barford applied the following equation:

Where: R_a=Actual Revenue
R_e=Estimated Revenue
S_a=Actual Cost of Spare Parts
S_e=Estimated Cost of Spare Parts

Applying the formula to the numbers found in Plaintiff's Exhibit 14, Mr. Barford calculated a spare parts adjust-

ment of DM 1,444,964. Finally, Mr. Barford derived the following formula to calculate an equitable adjustment for the profit plaintiff would have made on the fixed costs and spare parts:

Where: P_e=Expected Profit
C_e=Expected Total Costs
C_a=Equitable Adjustment to Fixed Costs and Spare Parts

Applying the formula, Mr. Barford calculated an additional profit of DM 558,541. The total claimed under the increased cost theory is DM 3,922,739.

Substantial questions surround the components of plaintiff's increased cost claim calculation. Foremost among these concerns is the classification of several costs as "fixed costs" and the lack of evidence supporting plaintiff's original CLIN prices.

Fixed costs are:

> Costs that do not vary with changes in output and would continue even if firm produced no output at all, such as most management expenses, interests on bonded debt, depreciation, property taxes, and other irreducible overhead.

Black's Law Dictionary 637 (6th ed. 1990). Plaintiff's expert and defendant's expert concurred that the proper definition of "fixed costs" is those costs that do not vary with the volume of business. *Compare* (Tr. 6/2/98 at 304-305) *with* (Tr. 6/2/98 at 420-421). They did not, however, agree on whether individual components of plaintiff's increased cost theory were properly classified. Mr. Cotton testified that he had never seen a service contract where payroll costs were entirely fixed as they are in plaintiff's claim calculation. In reviewing Datalect's rec-

ords, Mr. Cotton noted that Datalect's labor costs fluctuated throughout the contract period. Mr. Cotton noted that if labor cost varied, than several related costs should also vary.

When asked whether individual components of the claim calculation were properly characterized, Mr. Barford testified that he did not know. In fact, Mr. Barford testified that "officials at Datalect" were responsible for classifying costs as fixed or variable. (Tr. 6/2/98 at 313). Similarly, the court is unable to determine if plaintiff's claimed costs are properly characterized. Plaintiff has failed to provide sufficient evidence to support this claim.

As previously noted, Datalect provided very little information on how its bid was prepared. Datalect's increased cost calculation purports to demonstrate Datalect's projected costs and revenues at the time the bids were submitted as well as Datalect's actual costs in performing the Army contract. These figures, however, are not supported by the record. Datalect did not provide the court with contemporaneous evidence of the projected call volume, anticipated costs, or price calculations used in the preparation of Datalect's bid. While several witnesses testified that Datalect relies upon a statistical database to formulate its bids, no cost analysis was provided to support the Army bid prices. Thus, Plaintiff's Exhibit 14 includes claimed aggregate cost projections that are unsupported by evidence. Moreover, elements of plaintiff's cost calculation include expenditures which are not permitted under the Federal Acquisition Regulation. For example, plaintiff's cost adjustment claim includes an adjustment for "entertainment" costs seemingly in violation of 48 C.F.R. § 31.295-14. Plaintiff's increased cost claim calculation does not provide a reasonable basis for computing plaintiff's damages.

Plaintiff has failed to meet its burden of proving the claimed damages. Under plaintiff's hypothetical bid calculation and its increased cost calculation, plaintiff has failed to establish the reasonableness of the claimed damages and their causal connection to defendant's negligence. Plaintiff's failure goes beyond the pure mechanics of computation to a failure to prove essential elements of the calculations. Plaintiff provided no credible evidence supporting its original CLIN bid prices and insufficient evidence demonstrating the effect of the government's faulty estimate on the bid. Similarly, plaintiff's claimed costs are not adequately supported by credible evidence.

The court has considered applying the "jury verdict method" of awarding damages. The jury verdict is highly disfavored. *Dawco Constr. Inc. v. United States*, 930 F.2d 872, 880-881 (Fed. Cl. 1991). It is a method of last resort that may be employed where (1) there is clear proof of injury; (2) there is no more reliable method of computing damages; and (3) the evidence is sufficient for the court to make a fair and reasonable approximation of the damages. *WRB Corp. v. United States*, 183 Ct. Cl. 409, 425 (1968). While the court is persuaded that plaintiff incurred monetary injury as a result of defendant's faulty estimate, the jury verdict cannot be applied in this case. Plaintiff has not provided the court with sufficient evidence to make a reasonable approximation of the damages incurred. Thus, application of the jury verdict method would yield an arbitrary award.

CONCLUSION

For the foregoing reasons, the court concludes that plaintiff is not entitled to recover. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

/s/ M. R. Tidwell
MOODY R. TIDWELL
Senior Judge

APPENDIX C

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 95-328 C

(FILED: December 18, 1997)

DATALECT COMPUTER SERVICES, LTD.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

Cross-motions for Summary Judgment;
Duty of Care in Preparing Estimate Requirements;
Breach of Requirements Contract; Damages

ORDER

TIDWELL, *Judge:*

This case is before the court on defendant's motion for summary judgment and plaintiff's cross-motion for partial summary judgment, both filed pursuant to Rule 56 of the Court of Federal Claims (RCFC 56). The parties entered into a requirements contract pursuant to which plaintiff provided maintenance and repair services for "tier-III" computer equipment to the United States Army, Europe ("USAREUR"). At issue is whether defendant, through

the USAREUR, breached its duty of care in preparing its estimate of requirements, and whether the government is liable for failing to order all of its actual requirements from plaintiff. The court heard oral argument on the parties' motions on September 17, 1997. For the reasons set forth below, the court grants in part and denies in part defendant's motion for summary judgment as to entitlement and damages, and grants in part and denies in part plaintiff's cross-motion for partial summary judgment as to entitlement.

BACKGROUND

On July 23, 1992, defendant, through the USAREUR Contracting Center, Fifth Signal Command, issued an invitation for bids ("IFB") for the maintenance and repair of government-owned "tier-III" (freestanding, office-based, personal) computer equipment in Germany, Belgium, the United Kingdom and Italy. On February 5, 1993, USAREUR entered into requirements contract No. DAJA 37-93-D-0065 with Datalect Computer Services, Ltd. ("Datalect"), a corporation organized under the laws of the United Kingdom. As a result of being awarded the contract, Datalect established an operation in Germany. Performance of the contract, which incorporated a one year term with three one year options, began in March, 1993. The government exercised all of the options, and performance continued through March, 1997.

The Contract

The IFB and resulting contract contained a mandatory estimate of the government's requirements for tier-III maintenance and repair. *See* 48 C.F.R. § 16.503(a)(1) (1996) (requiring a statement of estimated needs). In addition, the contract provided that Datalect would be the exclusive contractor for such requirements. The contract stated:

> The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government's requirements do not result in orders of the quantities described as "estimated" or "maximum" in the Schedule, that fact shall not constitute the basis for an equitable price adjustment. . . . Except as this contract otherwise provides, the Government shall order from the contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.

(Def.'s App. at 99.)[1] While an equitable adjustment was unavailable under the contract for failure of the government's requirements to meet the estimate, the Statement of Work ("SOW") required Datalect to furnish all labor, materials and facilities to provide demand maintenance on all of the tier-III equipment covered by the contract.

The location of the mandatory estimate in the solicitation and contract is unclear. Defendant contends that "Technical Exhibit 1" was the official "estimate." Technical Exhibit 1 listed the total number of service calls in specific locations to Sorbus GmBH ("Sorbus"), the tier-III maintenance contractor from 1989 to 1993, in fiscal year 1991.[2] Technical Exhibit 1 also listed the manufacturer and model of each piece of equipment serviced,

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1 References to the appendices of either defendant's or plaintiff's motion will be cited as "App." When the same material is contained in both parties' appendices, the court will cite to the appendix of defendant, the original moving party. If the materials are only contained in plaintiff's appendix, the court will cite to plaintiff's appendix.

2 The solicitation was issued in mid-1992, and therefore the workload information was only available for fiscal year 1991, and not fiscal year 1992.

if such information was available. Accompanying the historical workload information provided in Technical Exhibit 1, was an instruction that:

> This technical exhibit furnishes data, which in conjunction with the contractor's experience in the trade, should allow the contractor to arrive at an accurate estimate of the workload. The information presented here consists of repair data for FY 91.

(Def.'s App. at 104.) The number of service calls to Sorbus in fiscal year 1991 totaled 16,939, averaging approximately 60-65 calls per business day.

Plaintiff avers that "Section B" of the proposed contract was the official "estimate." Section 8 contained the specific maintenance/repair functions, or "CLIN's," to be performed by the tier-III maintenance contractor. The CLINs were organized by generic types of equipment to be serviced, and were identified by item numbers. Examples of CLINs included "demand maintenance calls per keyboard" and "demand maintenance calls per laser printer/scanner." (Def.'s App. at 197.) The contract provided for bids/payment on a fixed price per call basis for each CLIN. Adjacent to each CLIN was an estimate of the quantity of the service required, a unit of measure, and two lines for the contractor to fill in for its proposed unit price and total price (the estimated quantity multiplied by the unit amount). In preparing the quantity estimate in the CLINs, the contracting officer representative ("COR") at the time the solicitation was complied, Raymond Selken, consulted records contained in Technical Exhibit 1 and made minor reductions in the number of calls per CLIN in the base contract versus the number of calls per CLIN depicted in the contract option years. For example, Mr. Selken incorporated a 5% reduction from the 1991 workload figures in each of the

contract's option years to account for a reduction of requirements as a result of the ending of the Persian Gulf War. Accompanying the itemized list of CLINs was the following statement: "DEMAND MAINTENANCE IN ACCORDANCE WITH THE STATEMENT OF WORK (SOW), ATTACHMENT 1. NOTE: OFFERORS ARE REQUESTED TO PRICE PER DEMAND CALL. QUANTITIES ARE YEARLY ESTIMATES." (*Id.*)

While the location of the official estimate is unclear, both "estimates" described above were based upon the historical workload information in Technical Exhibit 1. In addition, the government submits that in its "estimate" it did not undertake, outside of some minor reductions in requirements, to evaluate or set forth factors that may have affected the number of service calls to the contractor.

Actual Service Call Rate

Despite the historical workload of 60-65 service calls per business day, the actual service call rate under the Datalect contract fluctuated between approximately 25-45 service calls per day. In a letter to Datalect dated November 22, 1994, James Demetroulis, a contracting officer for the Fifth Signal Command, stated that an approximate 48% decrease in calls had occurred under the Datalect contract. Datalect did not adjust its work force or parts inventory downward when it received fewer service calls than depicted in the solicitation. Beginning approximately 4-6 months into Datalect's performance of the contract, Datalect complained to the contracting officer about the reduced call rate. The government cited as contributing factors the decreased population of Army personnel in Europe since 1991, resulting from the Base Realignment and Closure Act, the reduction in forces or troop strength in USAREUR ("the drawdown"), the purchase of new computers under extended one to five year warranties in

the early 1990's, and the turning-in of outdated computer equipment. In its inquiries, Datalect also cited the government's apparent in-house maintenance as a factor contributing to the reduced call rate. The government responded that while in-house maintenance was being performed, the contract did not preclude such activities. In addition, the contracting officer stated that the estimate provided for in the contract was the "most current" at the time of the solicitation.

In-House Maintenance

During Datalect's contract term, an undermined amount of maintenance and repair of tier-III computers was performed by Army personnel, in addition to the services performed by Datalect. Such in-house, or self-, maintenance took several forms, including maintenance by information management officers ("IMO"), who also called on Datalect to repair malfunctioning computers. IMOs were integral to Datalect's demand maintenance function, because the contract allowed either Datalect or the Army (via IMOs) to perform "technical inspections" to evaluate the equipment for "serviceability" and to assign a "condition code" to the computer's malfunction. The function of an IMO, according to defendant, "is to assist other Army personnel in a wide range of computer-related activities including the procurement, set-up, operation, upgrading, maintenance, diagnosis, repair, and disposition of computer equipment." (Def's Prop. Findings of Uncontroverted Fact at 12.) Thus, a system was established whereby when an Army computer malfunctioned, the user sought assistance from an IMO, who, if necessary, would contact a government operated "help desk." The help desk would then typically document the call and make a service call to the tier-III contractor. Defendant believes that there were approximately 400-450 IMOs in

USAREUR during Datalect's contract, and every computer user had access to at least one, and probably several, IMOs. The Army periodically conducted orientation and training sessions for IMOs related to computers and computer problems, including instructions on the diagnosis and correction of computer malfunctions. IMO training increased during Datalect's contract.

Self-maintenance was not only performed by IMOs, however. Users, help desk personnel, and other government personnel also performed computer troubleshooting or repair. Self-maintenance activities ranged from basic correction of computer problems to actually replacing parts within computers.[3] The Army also set up at least two repair "shops" in certain units that performed repairs on computer equipment, including tier-III equipment. Army personnel also engaged in cannibalization, defined by defendant as "instances such as when a malfunctioning computer is repaired by replacing a malfunctioning part from another computer, then having Datalect replace the

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[3] Defendant defines "self maintenance" as "an instance where a piece of computer equipment fails but is made to operate satisfactorily by the user, information management officer, help desk personnel, or other Government personnel without making a service call to Datalect." (Def.'s Prop. Findings of Uncontroverted Fact at 17.) Plaintiff defines "in-house," or self-, maintenance as:

> [A]ny service that could be ordered under the contracts and that is not ordinarily incident to moving, setting up, and using properly functioning computer equipment. Checking cables and turning on the power are ordinary parts of setting up and operating a computer, as is dusting off the equipment. Opening the box to replace motherboards, serial boards, other peripheral boards, hard drives, floppy drives, print heads, power supplies, fuses, and batteries or to clean thoroughly the internal workings is *not* part of ordinary use, and therefore, was to be performed by Datalect alone.

(Pl.'s Opp'n to Def.'s Mot. for Summ. J. and Cross-mot. for Partial Summ. J. as to Entitlement at 13-14 n.19 (emphasis in original).)

missing part in the 'donor' computer."[4] (Def.'s Prop. Findings of Uncontroverted Fact at 11.)

New Computers

In addition to the "self-maintenance" performed by Army personnel, the government acquired a large number of new computers during the term of Datalect's contract. Between fiscal years 1991-1994, the purchase rate for new computer systems approximately doubled,[5] due in part to the long awaited arrival of "486" generation computers, as well as to budgetary and administrative factors. A significant number of these new computers purchased by the Army came with warranty periods ranging from one to five years. The Army utilized these warranties, making a significant number of warranty calls to vendors other than Datalect during the term of Datalect's contract.

Alfie Karmal, the signatory of Datalect's Best and Final Offer, stated that in preparing its bid, personnel at Datalect knew of the troop drawdown and the plans of the government to purchase new equipment. Datalect did not

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[4] In a letter to Datalect dated November 22, 1994, James Demetroulis, the contracting officer, recognized the occurrence of cannibalization and invited dialogue between the government and Datalect on "reimbursement for parts where multiple unrelated failures occurred in a single machine, and in cases where it is evident that these failures were not the result of normal wear and tear but appear to be a consolidation of failures in a single machine." (Def.'s App. at 24-26.) In addition, Mr. Demetroulis advised Datalect that "[i]n cases of cannibalization (defined as internal parts missing), . . . you are requested to charge for a technical inspection in order to close the call, and to notify this office immediately . . . . Cannibalization is not authorized and these individuals may be held accountable for the cost of repairs/replacements." (*Id.*)

[5] In fiscal year 1989-1990, the acquisition rate was approximately 2,100 systems per year, while in fiscal years 1991-1994, despite the drawdown, the acquisition rate was approximately 5,000 systems per year.

know, however, the extent of the government's plans to purchase new equipment or the duration of the warranty agreements that would be negotiated with respect to the new equipment. In fact, Datalect's position on the warranty work for the new tier-III equipment purchases is that it should have handled such work.

Preparation of the "Estimate"

As stated above, while the location of the official "estimate" of the government's requirements in the solicitation and resulting contract is unclear, both Technical Exhibit 1 and Contract Section B incorporated the historical workload information during fiscal year 1991 under the Sorbus contract. Mr. Selken, the COR who prepared the CLINs in Contract Section B, did not know until after the solicitation went out that some Army Commanders had decided to do their own maintenance of tier-III equipment. During oral argument, however, defendant acknowledged that such in-house maintenance of tier-III equipment had been encouraged by the Army and the Fifth Signal Command during the early 1990s. Defendant stated that "[t]he Army has prerogatives to try to cut costs, to try to be more efficient, etc., etc. One of the things they did in the early 1990s was to beef up its IMO training program. No dispute about that." (Trans. at 34.)[6]

Mr. Selken also did not know that the Army was planning on purchasing a significant number of new computers under extended warranties during the term of Datalect's contract. It was well known in the USAREUR, however, that purchases and negotiations for new Tier III equipment were occurring both before and during the solicita-

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[6] References to the Transcript of the September 17, 1997 Oral Argument on the parties' motions are cited as "Trans."

tion for the Datalect contract. Defendant acknowledged that "the solicitation did not purport to set forth factors (such as the purchase of new computers) that may have affected the number of service calls to the contractor." (Def.'s Statement of Gen. Issues at 4.)

Datalect's Claim

On March 17, 1995, after several letters requesting information from USAREUR on the reduced call rate, Datalect submitted a claim for an equitable adjustment based upon its assertion that the Army "breached" the contract by failing to disclose all relevant facts necessary for Datalect to accurately prepare its bid, and by failing to utilize Datalect to provide all of the government's requirements under the contract. Datalect claimed that its reliance on the high estimate of service calls resulted in Datalect's bid being "unrealistically low" to the detriment of Datalect and to the benefit of USAREUR. On March 27, 1995, the contracting officer denied Datalect's claim in its entirety, stating that the total estimated quantities in the solicitation were merely estimates based on the most current information available, which may or may not have resulted in service calls.

Plaintiff filed a complaint in this court on May 8, 1995. Plaintiff claims that defendant breached its duty to consider certain relevant information when compiling the workload estimates, including: (1) the impending troop drawdown; (2) plans to purchase new computer equipment with extended warranties; and (3) the intention to service its own computers during that time. Plaintiff also contends that defendant breached the contract by depriving Datalect of service calls by: (1) performing self-maintenance; and (2) utilizing extended warranty agreements on new computers.

Plaintiff seeks damages of $2,749,721 as of March 7, 1995 (plus subsequent damages), in compensation for its lost revenue, and costs. In addition, plaintiff asks for an order to the Army that it refrain from diverting service calls to its own maintenance facilities. Defendant filed a motion for summary judgment as to both entitlement and damages, and plaintiff responded with a cross-motion for partial summary judgment as to entitlement.

DISCUSSION

I. Summary Judgment

Summary judgment is appropriate when there exist no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Campbell v. United States,* 2 Cl. Ct. 247, 249 (1983). A genuine issue of material fact is one that would change the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The court does not weigh the evidence; it only determines questions of law based upon undisputed facts. Disputes over facts which are not outcome determinative, however, will not preclude the entry of judgment. *Id.* at 248. When the moving party has met its burden of showing entitlement to judgment as a matter of law, the burden shifts to the non-moving party to provide facts establishing that a genuine issue for trial exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986), and the non-moving party may not discharge its burden by cryptic, conclusory, or generalized responses. *See Willets v. Ford Motor Co.,* 583 F.2d 852, 856 (6th Cir. 1978); *Tunnell v. Wiley,* 514 F.2d 971, 976 (3d Cir. 1975).

When the parties have filed cross-motions for summary judgment, as in this case, the court must evaluate each party's motion on its own merits. The court's duty to de-

cide whether summary judgment is appropriate is not abrogated by the fact that both parties argue in favor of summary judgment and allege that there are no genuine issues of fact for trial. *Prineville Sawmill Co. v. United States*, 859 F.2d 905, 911 (Fed. Cir. 1988) (citing *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987)); *see also Bataco Indus., Inc. v. United States*, 29 Fed. Cl. 318, 322 (1993), *aff'd*, 31 F.3d 1176 (Fed. Cir. 1994). Summary judgment will not necessarily be granted to one party or another simply because both parties have so moved. *Corman v. United States*, 26 Cl. Ct. 1011, 1014 (1992) (citing *LewRon Television, Inc. v. D.H. Overmyer Leasing Co.*, 401 F.2d 689, 692-93 (4th Cir. 1968)). Cross-motions are no more than a claim by each party that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not establish that if one is rejected the other is necessarily justified. *Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir. 1968); *Bataco*, 29 Fed. Cl. at 322. The court must evaluate each party's motion independent of the other, and resolve all reasonable inferences against the party whose motion is under consideration. *Mingus Constructors*, 812 F.2d at 1391.

Defendant moved for summary judgment as to plaintiff's claim of liability on the part of the government and plaintiff's measure of damages, on the grounds that: (1) plaintiff is not entitled to payment for the historical number of service calls depicted in the contract because the contract does not require the evaluation or disclosure of factors that may affect the historical workload requirements; and (2) the government initiated service calls to Datalect when the government had the need to purchase such services from an outside vendor, which is all the contract requires. Plaintiff cross-moved for partial summary judgment only as to entitlement, alleging that the

quantum of plaintiff's injuries is disputed. Plaintiff alleges that defendant is liable for: (1) failing to base its estimate of requirements on the most current information available; and (2) failing to call on Datalect to fulfill the government's actual requirements for tier-III maintenance and repair.

After careful consideration of the parties' arguments, the court concludes that this case is ripe for summary judgment on the entitlement issue. As discussed below, the court finds that: (1) defendant's failure to consider information available to it in formulating its estimate constituted a breach of its duty to provide an accurate estimate; and (2) the government did not breach the requirements contract by performing in-house maintenance and utilizing extended warranty arrangements for tier-III maintenance and repair, because it was only required to purchase Datalect's services when it had a need to purchase such services. Therefore, defendant's motion for summary judgment is denied with respect to the estimate and with respect to the measure of damages, and is granted with respect to the alleged breach of contract. Plaintiff's cross-motion for partial summary judgment as to entitlement is granted with respect to the government's negligent estimate and denied with respect to the alleged breach of contract.

II. Faulty Estimate

A requirements contract provides for filling all actual requirements of the government for supplies or services during the contract period by purchasing from the awardee, who provides them at the agreed price. 48 C.F.R. § 16.503(a) (1996). Such arrangements are appropriate when the government anticipates recurring requirements but cannot predetermine the precise quantities

of supplies or services that will be necessary during the contract period. 48 C.F.R. § 16.503(b) (1996).

In a solicitation contemplating a requirements contract, a contracting officer must include an estimate of the quanity of supplies or services to be ordered under the requirements contract in order to provide offerors a guideline as to the contract's magnitude and scope. The Federal Acquisition Regulations state that:

> For the information of offerors and contractors, the contracting officer shall state a realistic estimated total quantity in the solicitation and resulting contract. This estimate is not a representation to an offeror or contractor that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable or normal. The contracting officer may obtain the estimate from records of previous requirements and consumption, or by other means, and should base the estimate on the most current information available.

48 C.F.R. § 16.503(a)(1) (1996). This regulation allocates to the contractor the risks associated with a variance between actual purchases under the requirements contract and the reasonably estimated quantities. *See Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992). Indeed, the Datalect contract specifically provided that "if the Government's requirements do not result in orders of the quantities described as 'estimated' or 'maximum' . . . , that fact shall not constitute the basis for an equitable price adjustment." (Def.'s App. at 99.) Estimated quantities are "not guarantees or warranties of quantity[.]" *Shader Contractors, Inc. v. United States*, 276 F.2d 1, 4 (Ct. Cl. 1960), and a significant variance between estimated quantities and actual purchases under a contract

does not, in itself, give rise to liability on the part of the government. *See Clearwater Forest Indus., Inc. v. United States,* 650 F.2d 233, 240 (Ct. Cl. 1981); *see also Womack v. United States,* 389 F.2d 793, 802 (Ct. Cl. 1968).

This risk allocation associated with requirements contracts, however, is only applicable when the government's estimate is reasonably prepared. An offeror on a government contract is entitled to rely on the government estimate set forth in the contract as representing an honest and informed conclusion. *Womack,* 389 F.2d at 801 (citing *Snyder-Lynch Motors, Inc. v. United States,* 292 F.2d 907, 909-10 (Cl. Ct. 1961)); *see also Medart,* 967 F.2d at 581 ("[P]resumably contractors rely on the proffered estimates in formulating their bids . . . ."). In formulating its estimate, "the government must act in good faith and use reasonable care in computing its estimated needs; it is not free to carelessly guess at its needs." *Medart,* 967 F.2d at 581. The government is bound by a good faith standard which requires it to seek the most current information available, and either reformulate its estimate when warranted by the information available, or notify offerors of situations or factors likely to affect the estimate. *See* 48 C.F.R. § 16.503(a)(1) (1996) ("The contracting officer . . . should base the estimate on the most current information available."); *see also Medart,* 967 F.2d at 582 (stating that in formulating its estimate, the government must take into account information "reasonably available" to it); *see also Chemical Tech., Inc. v. United States,* 645 F.2d 934, 945-46 (Ct. Cl. 1981) (finding the government's estimate preparation unreasonable and that it should at least have notified bidders of the potential occurrence of a situation that significantly affected its requirements). Accordingly,

"[w]here a contractor can show by preponderant evidence that estimates were 'inadequately or negligently prepared, not in good faith, or grossly or unreasonably inadequate at the time the estimate was made[,]' the government could be liable for appropriate damages resulting." *Medart*, 967 F.2w at 581 (quoting *Clearwater Forest*, 650 F.2d at 239).

Defendant does not dispute that the government was aware of several factors that would likely affect the government's requirements during the term of Datalect's contract, including the troop drawdown, the encouragement of and resulting self-maintenance of tier-III equipment, and the influx of new computers with extended warranties. Defendant stated the following during oral argument:

> Did the government know of factors that could impact the call rate? The answer is taken as a whole, yes, the Government knew there was going to be a troop drawdown. The Government knew that the Government was going to purchase new computers. The Government knew that IMOs were being trained to troubleshoot computers.

(Trans. at 31.) Additionally, defendant states in its moton for summary judgment that "[p]lainly, such an attempt to depict conditions that could affect the Government's requirements was *not* undertaken in the solicitation, and was not required." Def.'s Mot. Summ. J. at 9 (emphasis in original).) As a result, in formulating its estimate, the government merely restated in Technical Exhibit 1 (or slightly altered in Contract Section B) its 1991 historical workload, without incorporating in the estimate its knowledge that the government's requirements could be affected by the several factors described above.[7]

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[7] While the location of the official "estimate" is unclear, both Technical Exhibit 1 and Contract Section B are based on the 1991 his-

As a result of the government's failure to take into account such factors in formulating its estimate, the court holds that defendant negligently prepared its estimate and that plaintiff is therefore entitled to recover.

Defendant cites *Medart* in support of its argument that the historical workload submitted as the government's estimate was sufficient, and that any additional manipulation of such estimates to account for factors that may affect its requirements was not required by the contract. *Medart* involved a requirements contract to supply cabinets to federal agencies through the General Services Administration ("GSA"). *Medart*, 967 F.2d at 580. The contractor alleged that the government had negligently formulated its estimated needs by only using the prior year's orders as its guide. *Id.* at 581. The contractor argued that the government should have, among other things, contacted or polled end-users about their projected needs and budgets, considered the use of statistical formulas such as regression analysis, used more than one year's ordering history, and checked the effectiveness of its estimating procedure based on past performance. *Id.* In finding for defendant, the court rejected the need for such speculation, stating that while these approaches may have improved the accuracy of the estimate, the government is

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torical workload. Contract Section B incorporates a few additions and changes to the 1991 workload. In analyzing the government's estimate under the cross-motions for summary judgment, the court considered each motion independently and resolved all inferences against the moving party. In granting plaintiff's motion for summary judgment on the estimate issue, the court took as true defendant's contention that the official "estimate" was contained in Technical Exhibit 1. The court further determined that while the location of the estimate is unclear, that fact is not material to the outcome in that both Technical Exhibit 1 and Contract Section B were based upon the same 1991 historical workload information, and any differences between the two were immaterial for the purposes of the court's analysis.

not obligated to search for or create additional information. *Id.* at 582. The government must simply use the most current information (whether such information is records of previous consumption or other information) that is reasonably available to it. *Id.; see also Crown Laundry and Dry Cleaners, Inc. v. United States*, 29 Fed. Cl. 506, 523 (1993) (holding that the failure to act on suspicions that additional factors that could affect the estimate exist provides a basis for awarding damages); *see also* 48 C.F.R. § 16.503(a)(1) (1996) (estimate to be based on most current information available). In the case at bar, defendant's reliance on *Medart* is misplaced because in *Medart*, there was no information available at the time the estimate was created that indicated that the government may have misstated its requirements. *Medart*, 967 F.2d at 581-82. By contrast, when information exists, such as in the present case, *Medart* actually requires its evaluation or disclosure. *See id.*

Defendant further argues that while it knew of factors that could have affected the estimate, the contract explicitly warned that the estimate was not a representation or warranty that the government's requirements would meet the estimate, and that the clause accompanying Technical Exhibit 1 specifically warned bidders to formulate their own estimate from their knowledge of the trade: Despite defendant's claims, however, the government's duty to provide an accurate estimate is not fulfilled through warnings that the estimates may be incorrect. The purpose of the estimate is to provide bidders with an idea of the magnitude and scope of the contract, and to allow them to bid accordingly. *See Shader*, 276 F.2d at 7 (stating that while estimates are not guarantees or warranties of quantity, they are "figures which the bidders might reasonably employ so as to make realistic quotations"). "Intrinsically, the estimate . . . must be the product of such relevant un-

derlying information as is available . . . . If the bidder were not entitled to so regard it, its inclusion in the invitation would be surplusage at best or deception at worst." *Womack*, 389 F.2d at 801. Any disclaimer by the government that it disclosed to bidders that the "estimate" was the 1991 workload is inadequate when additional information is available, as bidders are left to presume that there weren't any additional factors that could affect the historical workload. Therefore, even if defendant's contention that Technical Exhibit 1 contained the official estimate is taken as true, the court finds that the government's duty to provide a reasonable estimate requires more when additional information is available upon reasonable investigation. The government is clearly in the best position to acquire such information about its internal operations and needs, and to determine what effect, if any, such information would have on the estimates of its requirements.[8]

Here, Datalect's bid prices reflected the estimate of approximately 60-65 calls per day by creating an average of the most and least expensive items for each CLIN

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[8] In addition, if during the course of the contract term the government substantially changed (increased or decreased) its requirements as a result of factors unrelated to simple user demand, the government's implied duty of good faith and fair dealing may require it to inform the contractor of such changes, and to officially update the estimate to better reflect the changed requirements. *See Celeron Gathering Corp. v. United States*, 34 Fed. Cl. 745, 752-53 (1996). In *Celeron*, the court held that the government's failure to "candidly disclose," by updating the estimate or otherwise, to the contractor extensive problems with an oil well that would substantially affect the government's supply of oil under a contract to supply crude oil constituted a breach of the government's duty of fair dealing. *Id.* at 752. The court stated that "[w]hether framed as a failure to cooperate, a failure to disclose later superior knowledge, or even a failure to update an estimate, the government's conduct was simply unjustifiable." *Id.* at 753.

based upon the estimate and its costs to perform that many calls. Datalect was prepared during the contract term to perform at least that many calls. Datalect reasonably relied upon the government's estimates while the estimates had been negligently and unreasonably prepared. Accordingly, Datalect is entitled to recover for the government's negligence. Plaintiff's cross-motion for summary judgment is granted with respect to the estimate, and defendant's motion for summary judgment on the estimate issue is denied.

III. Breach of Contract For Failure to Order All Requirements From Datalect

Defendant moved for summary judgment as to plaintiff's claim that defendant breached the contract by failing to order all of its actual requirements for tier-III maintenance and repair from Datalect. In its motion, defendant concedes that the government performed in-house maintenance on tier-III equipment, and sent some work out under extended warranty arrangements.[9] Defendant alleges that the contract permitted both in-house maintenance and warranty repairs. Plaintiff cross-moved for

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[9] The court's analysis applies only to the use of those warranties on new tier-III equipment purchased after the award of the Datalect contract. Such warranties were often "extended warranties" of between one and five years, and are referred to in this order as "new warranties."

With respect to warranties on equipment in use at the time the contract was awarded, Datalect's Best and Final Offer stated:

> Datalect will, in conjunction with the US Government, negotiate a practical solution to failed equipment still in warranty. The obvious solution would be for Datalect to handle warranty work on behalf of the manufacturer. This would obviate the need to suffer lengthy delays with manufacturers' warranty turnaround times.

(Def.'s App. at 193.) The court has no knowledge of whether such a "practical solution" was ever negotiated.

partial summary judgment, alleging that the failure of the government to send *all* of its actual, objective requirements for tier-III maintenance and repair to Datalect constituted a breach of contract. For the reasons set forth below, the court grants defendant's motion for summary judgment, and denies plaintiff's cross-motion for summary judgment, as to the alleged breaches of contract.

A. The Requirements Clause

A determination of whether the government's in-house maintenance and utilization of new warranties was proper requires an interpretation of the requirements clause in the Datalect contract:

> Except as this contract otherwise provides, the Government shall order from the contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.

(Def.'s App. at 99.) Defendant argues that the contract language "required to be purchased" entitles the government to purchase services from plaintiff only when the need arises to actually purchase such services. Plaintiff alleges that the contract terms require the government to purchase services from Datalect whenever a need materializes for the maintenance or repair of tier-III equipment. Plaintiff, therefore, interprets the contract as restricting any in-house maintenance by the government, and as restricting the government's ability to use new warranty arrangements. Plaintiff claims that any other interpretation would render the contract unenforceable for lack of consideration.

B. Requirements Contract—Enforceable With Appropriate Consideration

The earmark of a requirements contract is that the government agrees to purchase all of its actual requirements for specified supplies or services from the awardee, who provides them at the agreed price. 48 C.F.R. § 16.503(a) (1996). Requirements contracts lack a promise from the buyer to order a specific amount, but consideration is furnished, and the contract is rendered enforceable, by the buyer's promise to turn to the seller for all such requirements as they develop. *Torncello v. United States*, 681 F.2d 756, 761 (Ct. Cl. 1982). The entitlement of the seller to all of the buyer's requirements is the key, for if the buyer were able to turn elsewhere for some of its needs, then the contract would be unenforceable for lack of consideration.[10] *Id.* at 761-62. Thus, a requirements contract must contemplate an exclusive relationship between the contractor and the government, where the contractor has the exclusive right and legal obligation to fill all of the government's needs for the services or goods covered by the contract. *Modern Sys. Tech. Corp. v. United States*, 979 F.2d 200, 205 (Fed. Cir. 1992) (citations omitted).[11]

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[10] In that case, the contract would be indistinguishable from an indefinite quantity contract with no stated minimum, which is unenforceable for lack of consideration. *See Mason v. United States*, 615 F.2d 1343, 1346 n.5 (Ct. Cl. 1980). An indefinite quantity contract lacks a promise to buy all requirements from the contractor, and is only enforceable if the government promises to purchase a minimum amount of goods or services. *Id.*

[11] While the parties stipulate that the contract at issue was one for requirements, the court must make its own determination of the type of contract at issue. *See Crown Laundry*, 29 Fed. Cl. at 515 ("[T]he court is not bound by the name or label given to a contract."). In determining the type of contract, an interpretation that saves the contract instead of voiding it is favored. *Torncello*,

C. The Requirements Clause Properly Excludes Services Performed In-House and Services Procured Through "New" Warranties

In light of the above definition of a requirements contract and the requirements clause at issue in this case, the court must first determine what must be purchased under the requirements clause, and whether the resulting relationship grants appropriate consideration to each party. Pursuant to the requirements clause in the contract, the government's requirements for Datalect's services were those that it required to *purchase*, rather than all of the needs of the government for tier-III maintenance or repair. Consideration was therefore furnished under the contract through the government's promise to call on Datalect (and no other contractor) when it required to purchase, rather than when it simply needed, tier-III maintenance or repair. Such consideration renders the contract fully enforceable as a result of the exclusive relationship created between the government and Datalect. In light of the above interpretation of the contract, the court holds that because the government's self-maintennace and use of new warranty arrangements constituted instances in which the government did not *need to purchase* tier-III maintenance, such activities fell outside of the government's require-

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681 F.2d at 761 (citations omitted). If a contract is susceptible of interpretation as either a requirements contract or an indefinite quantity contract, the court should uphold it as being a requirements contract. *E.H. Sales, Inc. v. United States*, 340 F.2d 358, 360-61 (Ct. Cl. 1965). In addition, courts favor validating contracts, not invalidating them, especially when the contract has been fully performed. *Crown Laundry*, 29 Fed. Cl. at 517. In light of the parties' intent that the contract be one for requirements, and the court's finding below that the government's promise to buy *all* of its requirements for tier-III maintenance services *that it needed to purchase* provides adequate consideration to render the contract enforceable, the court finds that this was properly a requirements contract.

ments under the contract, and therefore did not constitute a breach of the contract.

Plaintiff puts forth several arguments in support of its position that the government's in-house maintenance and/or the use of the new warranty agreements constituted breaches of the requirements contract. For example, in support of its argument that in-house maintenance constitutes a breach, plaintiff cites two cases binding upon this court, *Inland Container, Inc. v. United States*, 512 F.2d 1073 (Ct. Cl. 1975), and *Mason v. United States*, 615 F.2d 1343 (Ct. Cl. 1980), that are clearly distinguishable from the present case. *Inland Container* held that the Defense Depot, a facility of the Defense Supply Agency, Department of Defense, breached requirements contracts providing that the government would order from the contractor all of the boxes which were "required to be purchased." *Id.* at 1075. During contract performance, the Defense Depot acquired boxes from the GSA rather than the contractor. *Id.* The Defense Depot defended its actions by stating that the "requisitioning" of boxes from GSA, as a sister agency, was proper because they are part of the same entity (the government). *Id.* at 1076. The court disagreed, stating that the Defense Depot purchased boxes systematically and continually through GSA as its purchasing arm to meet the Depot's requirements, and even paid the costs of GSA in purchasing the boxes. *Id.* at 1077. *Inland Container* merely held that the purchase of boxes from another contractor (through the GSA) constituted a breach, and therefore does not support plaintiff's claim that in-house maintenance is always improper under requirements contracts. *See id.* Therefore, *Inland Container* is inapplicable to the case at bar in that Datalect has not alleged that defendant purchased tier-III maintenance services from another contractor.

In *Mason*, the court determined that the government's awarding of work to contractors other than plaintiff was proper under the contracts at issue because such contracts were indefinite quantity contracts rather than requirements contracts. *Mason*, 615 F.2d at 1350. In support of its argument that in-house maintenance in conjunction with requirements contracts is improper, plaintiff quotes, out of context, dicta from *Mason* that stated that the contracts at issue were not requirements contracts because if that were so "the Government would not be allowed to either itself perform the work or have other contractors do so," which the contracts clearly allowed. *Id.* at 1348. *Mason*, however, also stated that if the contracts were for requirements, "whenever defendant chose to order *work of the type described in plaintiff's contracts*, it was legally bound to order all such work from plaintiff." *Id.* at 1347 (emphasis supplied). *Mason* therefore limited the need to order all requirements from plaintiff to those requirements that the contract explicitly described or defined. In *Mason*, the type of work described in the contracts constituted the *same work, or requirements*, under the contract that would have been both supplied by the contractor and the government, thus precluding the exclusive relationship to provide all of the requirements for that service. In the case at bar, while both Datalect and the government may have been performing maintenance and/or repair on tier-III equipment, the actual requirements were divided by the contract into two distinct categories, those that the government *needed to purchase* and those that it *did not need to purchase*. The court's analysis of the requirements clause renders the contract fully enforceable in that, under the court's interpretation, Datalect had the exclusive opportunity to supply all of the government's requirements for tier-III maintenance that it required to purchase.

Plaintiff also highlights that the government could have reserved for itself the right to perform in-house mainte-

nance by utilizing an alternative requirements clause rather than the standard clause in the Datalect contract. While Federal Acquisition Regulation (FAR) 16.505(a) requires the contracting officer to include the standard requirements clause located at FAR 52.216-21 in all requirements contracts, the same regulation allows the contracting officer to instead insert one of four alternative requirements clauses. 48 C.F.R. § 52.216-21 (1996). Specifically, plaintiff argues that Alternative I, which is designed to be inserted in situations when "the requirements contract is for nonpersonal services and related supplies and covers estimated requirements that exceed a specific Government activity's internal capability to produce or perform," would have been more appropriate considering the government's intention to have others perform the same work in-house and its intention to enter into and to utilize the new warranty arrangements. 48 C.F.R. § 52.216-21 (Alternative I) (1996). Alternative I directs the following clause to be inserted in lieu of the clause used in the Datalect contract:

> The estimated quantities are not the total requirements of the Government activity specified in the Schedule, but are estimates of requirements in excess of the quantities that the activity may itself furnish within its own capabilities. Except as this contract otherwise provides, the Government shall order from the Contractor all of that activity's requirements for supplies and services specified in the Schedule that exceed the quantities that the activity may itself furnish within its own capabilities.

Id. While the court agrees with plaintiff that the government's failure to use the alternative clause is at least confusing, it does not entitle plaintiff to a finding of breach. As stated above, the requirements clause actually utilized

in the Datalect contract itself properly allows for in-house maintenance and the use of new warranty arrangements.

Plaintiff further argues that with respect to the use of new warranty arrangements, an answer given by the government during the solicitation process illustrates that the government intended Datalect to perform maintenance and repair services on tier-III equipment purchased after the award of the Datalect contract, whether or not such equipment was under warranty. On October 21, 1992, the government issued Amendment 2 to the solicitation, which included answers to several questions from bidders. Included was the following question from an offeror and answer from the government:

> Q.26 Reference Section I, Contract Clauses I-63. Will only the equipment referenced in the workload estimates be covered under this contract or will any equipment purchased during the life of the contract also be covered?
>
> A.26 Equipment in the workload estimates will be covered and also all desk top equipment purchased under the purview of 5th Signal Command during the life of the contract.

(Def.'s App. at 103.) Plaintiff states that it interpreted the answer to this question to mean that it would perform maintenance on all new tier-III equipment, regardless of whether such equipment was under warranty. If the new equipment, however, was under warranty, the government clearly would not have a need to purchase maintenance and/or repair on such equipment during the term of the warranty. While having a four year (one year with three one year options) contract to obtain services already furnished by other contractors under one to five year warranties appears to be fiscally irresponsible, the plain language of Datalect's contract allowed the government to

utilize its warranties because in that case the government would not have a requirement to purchase those services from Datalect. In light of the court's finding above that the requirements clause only obligated the government to procure from plaintiff that which it required to purchase, defendant's activities under the contract in utilizing new warranty arrangements to obtain maintenance and/or repair on the new tier-III equipment was proper.

Finally, the court has considered plaintiff's numerous other arguments in support of its allegations that the government's in-house maintenance and use of extended warranties was improper, and has found them to be without merit. There is no dispute as to any material fact relating to the issues of whether the in-house maintenance or the use of the new warranties was permissible under the contract, or whether the activities constituted a breach of the requirements contract. As a result of the court's finding above that the in-house maintenance and the use of the new warranties fell outside of what was "required to be purchased," the court finds that the government did not breach the requirements contract. Therefore, defendant's motion for summary judgment as to the breach issues is granted, and plaintiff's cross-motion for summary judgment as to those issues is denied.

IV. Damages

Defendant moved for summary judgment on plaintiff's measure of damages—the difference between the number of calls depicted in the estimate and the actual calls received by Datalect—as being overly simplified, resulting in Datalect being unable to prevail under any of its "breach" theories. Defendant contends that plaintiff has failed to meet its burden of establishing liability, causation, and resultant injury with reasonable specificity, citing *Servidone Construction Corp. v. United States*, 931

F.2d 860, 861 (Fed. Cir. 1991). In light of the court's finding however, that the government's in-house maintenance and use of warranties were proper under the contract, defendant's damages argument is moot with respect to those alleged "breaches." In addition, the court finds that the Datalect's alleged damages resulting from the government's faulty estimate is a material fact properly in dispute, and therefore defendant's motion for summary judgment on this issue, if it so moved, is denied.

CONCLUSION

If the estimate of the government's requirements had been reasonably accurate and had accounted for the several situations likely to affect the magnitude of the government's requirements, the government's performance of in-house maintenance and repair on tier-III equipment and its use of the new warranties would not have so severely damaged Datalect. What the court finds objectionable in this case is not the performance of the in-house maintenance or the use of extended warranties, but the failure of the government to account for these, and other, known factors in its original estimate. The court, therefore, holds the government responsible for its negligent estimate in this case, but does not find that the government violated the contract by performing in-house maintenance or by utilizing the new warranties.

As a result of the foregoing, the court grants plaintiff's cross-motion, and denies defendant's motion, for summary judgment on the issue of the faulty estimate. The court grants defendant's motion, and denies plaintiff's cross-motion, for summary judgment as to the alleged "breaches" of contract, including the use of self-maintenance and the use of the new warranties. The court denies defendant's motion for summary judgment on the damages

issue, and orders the parties to confer as to the appropriate amount of damages to which plaintiff is entitled. The parties shall contact the court within thirty days to schedule a status conference on how to proceed.

IT IS SO ORDERED.

/s/ M. R. Tidwell
MOODY R. TIDWELL
Judge

APPENDIX D

[Filed Sep. 21, 1999]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

99-5017

DATALECT COMPUTER SERVICES, LTD.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on September 28, 1999.

FOR THE COURT

/s/ Jan Horbaly
JAN HORBALY
Clerk

Dated: September 21, 1999